043

(4)

No. 06-376

In the

Supreme Court of the United States

JOHN F. HINCK and PAMELA F. HINCK,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Did the grant of selective, limited jurisdiction give the Tax Court exclusive jurisdiction over all 26 U.S.C. §6404(e)(1) claims, deny all relief for many taxpayers, and repeal by implication the existing 28 U.S.C. §§1346(a)(1) and 1491(a)(1) refund jurisdiction of the district courts and the Court of Federal Claims?

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Federal Circuit below is reported at 446 F.3d 1307 (Fed.Cir. 2006). Pet. App. 1-17. The opinion of the Court of Federal Claims is reported at 64 Fed.Cl. 71 (2005). Pet. App. Supp. 76-106. The opinion of the Fifth Circuit in *Beall v. United States* is reported at 336 F.3d 419 (5th Cir. 2003). Pet. App. 18-38.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 2006. A timely petition for a writ of *certiorari* was filed July 28, 2006, and granted on January 12, 2007. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

The following relevant statutory provisions, including relevant provisions of the Internal Revenue Code, are reprinted in the Appendix to the Petition for Writ of Certiorari at Pet. App. 39-55: 26 U.S.C. §§6015(f), 6110(j)(1)(B), 6330(d), 6404, 6511, 6512, 7422, 7430, and 7442, 28 U.S.C. §§1346(a)(1), 1491, and 2412. Relevant portions of the legislative history are reprinted in the Appendix to the Petition for Writ of Certiorari at Pet. App. 56-75 and in the Appendix to this brief.

STATEMENT OF THE CASE

This case is about whether the Court of Federal Claims ("the Claims Court") has jurisdiction in a refund case to review a refusal of the Internal Revenue Service ("IRS") to abate and refund interest that accrued against a taxpayer due to the IRS's own ministerial errors or delays.

Prior to 1986, the IRS asserted it had no statutory authority to abate interest that accrued due to its own errors and delays. In response, Congress enacted 26 U.S.C.

§6404(e).[1] Pet. App. 57-61.

For the tax years at issue, §6404(e)(1)(A) authorizes the IRS to abate all or any part of the interest assessed on any deficiency if the assessed interest is attributable, in whole or part, to errors or delays in performing ministerial acts by IRS officers or employees acting in their official capacity. Pet.App.42. A ministerial act is a procedural or mechanical act not involving the exercise of judgment or discretion that occurs during the processing of a taxpayer's case after all the prerequisites to the act have taken place. S.Rep.. 99-313, 1986-3 C.B. Vol. 3 208-9 (May 29, 1985); H.R.Rep. 99-426, 1986-3 C.B. Vol. 2 844-5 (Dec. 7, 1985); Treas. Reg. §301.6404-2T(b)(1); *Leffert v. Commissioner*, 81 T.C.M. (CCH) 1093, 1097-98 (2001); final §6404 regulations were issued Dec. 18, 1998, see Treas. Reg. §301.6404-2(b)(2).

The earliest district court and Claims Court cases addressing §6404(e)(1)(A) abatement refund claims found that those claims fell within existing §1346(a)(1) and §1491(a)(1) refund jurisdiction, but the claims were not justiciable because §6404(e)(1) was too general and lacked a standard for judicial review. Those early decisions concluded that §6404(e)(1) abatement was totally discretionary with the IRS. *Selman v. United States*, 941 F.2d 1060, 1062 (10th Cir. 1991); *Horton Homes, Inc. v. United States*, 936 F.2d 548, 550 (11th Cir. 1991);[2] *Kapp v. United States* , 989 F.2d 1202 (Table), 1993 WL 26728

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[1] Unless otherwise indicated all references to section, §, and the Tax Code are to the Internal Revenue Code at 26 U.S.C. References to §1346(a)(1) and §1491(a)(1) are to 28 U.S.C.

[2] Judge Allegra, who issued the *Hinck* decision in the Claims Court below, was one of the Government's appellate attorneys of record in *Horton Homes*. Neither party moved for recusal, and the Hincks agreed to go forward before Judge Allegra.

(Fed.Cir. 1993).[3] Subsequent courts have erroneously cited *Selman* and *Horton Homes*, without independent analysis, for the proposition that district courts lack subject matter jurisdiction over §6404(e)(1) cases. *Argabright v. United States*, 35 F.3d 472 (9th Cir. 1994); *Bax v. Commissioner*, 13 F.3d 54 (2nd Cir. 1993).

In contrast, the Tax Court consistently held that it lacked jurisdiction over §6404(e)(1) claims. *508 Clinton St. Corp. v. Commissioner*, 89 T.C. 352 (1987). In *508 Clinton St.*, the Tax Court recognized its limited jurisdiction is fixed by discrete statutory grants and that there was no such grant for §6404(e)(1) claims. The Tax Court also determined that §6404(e)(1) claims did not fit within any of the limited exceptions to the general rule that the Tax Court lacks jurisdiction over issues involving interest overpayments. The court also found, as a practical matter, it would be difficult to exercise its pre-assesment deficiency jurisdiction to consider potential interest on an unassessed deficiency, and moreover, §6404(e)(1), by its terms, is limited to requests for abatements only of interest that has been assessed. *508 Clinton St.*, at 354, *citing* §7442; *Commissioner v. Gooch Milling & Elevator Co.*, 320 U.S. 418, 420-422 (1943).

Subsequent appellate court consideration of Tax Court jurisdiction over §6404(e)(1) claims unanimously followed *508 Clinton St.* and further held the §7481(c) grant of continuing jurisdiction in 1988 allowing the Tax Court to make interest determinations relating to assessments paid following a Tax Court deficiency proceeding did not encompass §6404(e)(1) claims. Those later courts also held that the justiciablity determinations in *Selman* and *Horton Homes* also barred Tax Court consideration of §6404(e)(1)

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[3] Judge Lourie authored both the unpublished opinion in *Kapp* and the appellate opinion below in *Hinck*.

claims. *See Bax* at 57-8.

The facts relevant to this case are straightforward and undisputed. In 1986, John Hinck invested in Agri-Cal Venture Associates ("Agri-Cal"), a California limited partnership, and the Hincks reported their distributive share of losses on their joint 1986 income tax return.[4] Pet. App. Supp. 77. Agri-Cal was one of a group of limited partnerships collectively referred to as the "AMCOR partnerships" after their common general partner AMCOR, a California corporation. Morris Weiner was a limited partner in six AMCOR partnerships, including Agri-Cal. *Weiner v. United States* , 389 F.3d 152, 153-154 (5 th Cir. 2004) ("*Weiner*"). Raymond Beall was a limited partner in two other AMCOR partnerships. Pet. App. 19; *Beall v. United States*, 335 F.Supp.2d 743, 745 (E.D. Tex. 2004); see also *Beall v. United States*, 170 F.Supp.2d 709 (E.D. Tex. 2001).

The IRS examined the AMCOR partnership returns for tax years 1984, 1985, and 1986, and proposed to adjust some of the "partnership items" of some of the partnerships, including Agri-Cal. Partners other than the partners referenced here filed separate partnership-level Tax Court suits challenging those adjustments. Pet. App. Supp. 78; *Weiner* at 153-154.

While the partnership-level cases were pending, many AMCOR partners, including the Hincks, the Bealls, and Weiner, settled their partnership items with the IRS on Forms 870-P(AD). The Bealls and Weiner settled in 1997. The Hincks settled in 1999. Pet. App. Supp. 78.

In 1996, before the partners settled, Congress determined that, despite the 1986 grant of authority, the

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[4] Pamela F. Hinck is involved here only because the Hincks filed a joint return for 1986. Pet. App. Supp. 77.

IRS still refused to abate interest that accrued due to its own errors or delays. In 1996, in the Taxpayer Bill of Rights II ("TBOR2"), Congress amended §6404(e)(1) to add "unreasonable" before "errors and delays" and "managerial acts," a new type of act that could be the basis for abatement. Those changes are effective for interest accruing with respect to deficiencies or assessments for tax years beginning after July 30, 1996, and do not apply to the claims at issue here. In TBOR2, Congress also added §6404(h),[5] granting the Tax Court jurisdiction to review IRS refusals to abate interest under §6404(e)(1). Pet. App. 42-43. This provision applies to all years, not just the tax years beginning after July 30, 1996.

Pursuant to the Hincks', the Bealls', and Weiner's settlements, the IRS disallowed a portion of the partners' partnership items, assessed additional tax and interest against each, applied amounts they previously remitted, as applicable, and either billed them for the remainder, which was promptly paid, or refunded the excess to them. [6] The Hincks, the Bealls, and Weiner then each filed claims for refund including a Form 843 Claim for Refund and Request for Abatement. They all requested abatement and refund under §6404(e)(1)(A) of excessive interest accrued from March 21, 1989, until April 1, 1993, due to IRS errors and delays in the consolidated IRS examination of the AMCOR

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[5] Section §6404(h), though not substantively amended, has had its designation changed twice since its passage in 1996. The current §6404(h) was initially designated §6404(g). It was redesignated §6404(i) by the IRS Restructuring and Reform Act of 1998. Thus, from 1998 until 2002, it appeared in the United States Code as 26 U.S.C. §6404(i). In 2002, Public Law Number 107-134, §112(d)(1) repealed the former subsection (h) and designated then subsection 6404(i) as subsection (h), the designation it currently holds.

[6] The Bealls were assessed tax and interest in tax year 1981 due to a carryback from 1984.

partnerships. Their §6404(e) claims all arose out of identical facts regarding ministerial errors or delays by the IRS, asserted the same legal grounds for relief, and relied on the same authorities. Pet. App. 4, 19; Pet. App. Supp. 78-79; *Weiner* at 153-54; *Weiner v. United States*, 255 F.Supp.2d 624, 629-30 (S.D.Tx 2002), *rev'd on other grounds, Weiner*, 389 F.3d 152. The Bealls and Weiner raised multiple grounds in addition to §6404(e)(1) as bases for their refunds. Pet. App. 19-20; *Weiner* at 154.

The IRS issued notices of disallowance for all the claims filed by the Hincks and Weiner and all the claims filed by the Bealls (except their §6404(e)(1) claim). App. 4, 19; *Weiner*, 255 F.Supp.2d at 630.

Weiner and the Bealls reside in the Fifth Circuit and filed suit on their §6404(e)(1) claims in federal district court: Weiner in the Southern District of Texas and the Bealls in the Eastern District of Texas. Both based jurisdiction on §§1346(a)(1) and 7422(a). Pet. App. 21, *Weiner*, 255 F.Supp.2d at 659-60. The Hincks reside in California and filed suit in the Claims Court under that court's §§1346(a)(1), 1491(a)(1), and §7422(a) jurisdiction. Pet. App. Supp. 87.

Other AMCOR partners have filed similar refund claims and subsequent suits, primarily in the federal district courts of the Fifth Circuit and the Claims Court. Most of those partners raise multiple grounds for refund not at issue here. *Beall* (Fifth Circuit) and *Hinck* (Federal Circuit) were chosen as lead cases on §6404(e)(1) because they, uniquely, do not involve those other grounds for refund.[7] The other cases are stayed as to §6404(e)(1) pending the outcome of *Beall* and *Hinck*.

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[7] For procedural reasons, the Bealls' suit contained only their §6404 abatement claim.

In *Beall* and *Hinck*, the Government filed Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction asserting that §6404(e)(1) claims are justiciable only in the Tax Court and, therefore, the Tax Court has exclusive jurisdiction over those claims. Pet. App. 4-5, 19.

The Bealls and the Hincks relied on early §6404(e)(1) authority that recognized the district court's and the Claims Court's §1346(a)(1) and §1491(a)(1) refund jurisdiction over those claims. Pet. App. 6, 26. They both asserted the 1996 amendments to §6404 clarified that §6404(e)(1) abatement claims are now justiciable, not totally within the IRS's discretion. Consequently, the district courts and Claims Court are no longer barred from exercising their refund jurisdiction over those claims. The Hincks and the Bealls also asserted nothing in the plain language of the 1996 amendments or legislative history indicated the grant of Tax Court jurisdiction over §6404(e)(1) *pre-payment* claims automatically gave the Tax Court "exclusive" jurisdiction over *all* §6404(e)(1) claims. Otherwise, established §1346(a)(1) and §1491(a)(1) *refund* jurisdiction would have been impliedly repealed.

In July of 2001, the district court granted the Government's motion to dismiss in *Beall*. Pet. App. 19. The Bealls appealed and in 2003 the Fifth Circuit issued *Beall v. United States*, 336 F.3d 419 (5th Cir. 2003) ("*Beall*"), reversing the district court. The Fifth Circuit exhaustively analyzed §§1346(a)(1) and 7422(a) relative to §6404(e)(1), Pet. App. 20-26, and found that §6404(e)(1) claims for refund fit squarely within §§1346(a)(1) and 7422(a), Pet. App. 26. The court further held that the 1996 amendments clarified that §6404(e)(1) abatement claims are justiciable and not totally within the IRS's discretion. Pet. App. 30.

The Fifth Circuit was not persuaded that the grant of Tax Court jurisdiction automatically and silently repealed or limited the existing §1346(a)(1) refund jurisdiction over

§6404(e)(1) claims. Pet. App. 35-36. That court was persuaded that §6404(h) was added due to the limited nature of Tax Court jurisdiction, which is required to be specifically set out in the Tax Code, and nothing more should be read into the grant because nothing in the statute or legislative history indicated Congress meant for it to be exclusive. Pet. App. 36-37.

While *Beall* was pending, Weiner was chosen as the lead case in the Fifth Circuit to address the grounds for refund other than §6404(e)(1). The Fifth Circuit addressed those other grounds in a consolidated appeal from two district court cases at *Weiner*, 389 F.3d 152.[8] As to Weiner's §6404(e)(1) claims, the Fifth Circuit followed *Beall*, holding district courts had jurisdiction over those partners' §6404(e)(1) claims, and remanding his §6404(e)(1) claims for consideration on the merits.[9] *Weiner* at 163.

In February of 2005, the Claims Court granted the Government's motion to dismiss for lack of jurisdiction in *Hinck* on the grounds that §1346(a) was not a source of jurisdiction and that §1491(a)(1) jurisdiction was absent because the claim was not for an "illegal exaction." Judgment was entered February 4, 2005, and the Hincks appealed to the Federal Circuit. Pet. App. 4-5; Pet. App. Supp. 105.

The Federal Circuit addressed the same substantive legal and factual arguments raised in *Beall*. Pet. App. 18-38. But the Federal Circuit affirmed the lower court's

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[8] The Fifth Circuit vacated the dismissal for lack of jurisdiction over plaintiff's §6404(e)(1) claims at *Weiner v. United States*, 213 F.Supp.2d 728 (S.D.Tex., 2002), on remand to the district court; *Kraemer v. United States*, 2002 WL 575791 (S.D.Tex., 2002) (unpublished).

[9] The Claims Court has not yet ruled in the lead cases for those other issues.

dismissal on other grounds, holding that the 1996 grant of Tax Court jurisdiction was exclusive, withdrew existing Claims Court jurisdiction, and, consequently, the Claims Court did not have jurisdiction over the Hincks' §6404(e)(1) refund claims. Pet. App. 11-12. Unlike the Fifth Circuit, the Federal Circuit based its decision only on the amendments and accompanying legislative history and did not consider the nature of the Tax Court's limited jurisdiction, §§1346(a)(1), 1491(a)(1), and 7422(a) refund jurisdiction, or the general framework for resolving tax controversies. Pet. App. 13-15.

On July 28, 2006, the Hincks petitioned for writ of *certiorari* based on the split between the Fifth and Federal Circuits, which this Court granted on January 12, 2007.[10]

The Hincks assert that, after 1996, the Claims Court continues to have concurrent jurisdiction with the district courts under §§1346(a)(1) and jurisdiction under §1491(a)(1) to review §6404(e)(1) refund claims, notwithstanding the 1996 jurisdictional grant to the Tax Court.

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[10] After that petition was filed, on October 11, 2006, the Fifth Circuit issued an opinion at *Beall v. United States*, 467 F.3d 864 (5th Cir. 2006) ("*Beall II*"). On remand, the Government reasserted that the errors and delays at the heart of the Bealls' claim were not "ministerial acts" subject to §6404(e)(1) abatement. In *Beall*, 335 F.Supp.2d 743, the district court found for the Government, albeit on grounds not advanced by the Government, and dismissed under FRCP Rule 12(b)(6) for failure to state a claim. In *Beall II* the Fifth Circuit affirmed the dismissal but did not address or characterize all of the errors or delays raised by plaintiffs, particularly the most serious allegations. The Bealls moved for a clarification and/or reconsideration of the decision. That motion was denied. Consequently, the characterization of the IRS's most egregious errors and delays remains at issue in the pending §6404(e) cases. The Fifth Circuit's opinion in *Beall II* does not alter its holding in *Beall* that district courts have jurisdiction over §6404(e) interest abatement refund claims. The Claims Court has not yet addressed whether the errors and delays alleged, including loss of records and exceeding the scope of a search warrant, constitute ministerial acts.

Beall, Hinck and Weiner were all limited partners in AMCOR partnerships. Weiner and Hinck were both limited partners in Agri-Cal. The Fifth Circuit grants the AMCOR partners the right to a district court determination on the merits of their §6404(e)(1) claims for refund. The Federal Circuit denies that same right to Hinck and other AMCOR partners in the Claims Court.

SUMMARY OF THE ARGUMENT

Federal district courts and the United States Court of Federal Claims both have jurisdiction over §6404(e)(1)(A) refund claims under §1346(a)(1) and §7422(a). The Court of Federal Claims also has refund §1491(a)(1) jurisdiction over those claims. Prior to 1996, that jurisdiction was acknowledged, but it was widely held that §6404(e)(1) interest abatement determinations were totally discretionary with the IRS because the statute was too general and there was no standard for reviewing the IRS's actions. The Tax Court consistently held that it lacked jurisdiction over those claims for interest abatement because Congress had not made an express grant of jurisdiction to that court in the Tax Code as required by statute.

In 1996, Congress amended §6404 to include a specific grant of Tax Court jurisdiction and direct that court to review IRS interest abatement denials for abuse of discretion. Congress did not materially amend the other terms of the statute.

Those 1996 amendments answered the earlier questions regarding IRS discretion and judicial review of §6404(e)(1) abatement claims. The grant of jurisdiction to the Tax Court removed the impediments to the exercise of district court and Court of Federal Claims jurisdiction by clearly establishing Congress did not intend to leave abatement determinations to the IRS's discretion and that there is a justiciable standard for reviewing those claims.

The Fifth and Federal Circuits are split as to the effect of those amendments on jurisdiction. The Fifth Circuit holds that the district courts can now review IRS denials of §6404(e)(1) refund claims. The Federal Circuit holds that the Tax Court has exclusive jurisdiction and the amendments withdrew or repealed Court of Federal Claims jurisdiction over §6404(e)(1) abatement refund claims.

The plain language of the statute does not grant the Tax Court exclusive jurisdiction over §6404(e)(1) interest abatement claims. The plain language also does not withdraw or repeal established district court or Court of Federal Claims jurisdiction over §6404(e)(1) refund claims.

The Federal Circuit's holding is contrary to the established, historic bifurcation of Tax Court pre-payment jurisdiction and federal district court and Court of Federal Claims refund jurisdiction and opens the door for other challenges to this established jurisdictional scheme.

The Federal Circuit's holding that the Tax Court has exclusive jurisdiction also violates the due process rights of those taxpayers that are expressly excepted from Tax Court pre-payment jurisdiction and would require taxpayers to split their claims, which is contrary to established public policy and also results in due process violations.

ARGUMENT

I. The District Courts and Claims Court Have Concurrent §1346(a) Jurisdiction Over §6404(e)(1) Refund Claims

The Hincks filed suit under §1346(a)(1), which provides:

> The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of: (1) any civil action against the United States for the recovery of any internal-revenue tax alleged to

> have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws; . . .
>
> Pet. App. 51.

Section 1346(a)(1) is "broad" and "spacious" and allows taxpayers liberal redress to sue the United States to recover taxes which they feel have been wrongfully collected. *Williams*, at 532; *United States v. Dalm*, 494 U.S. 596, 601 (1990); *Flora v. United States*, 357 U.S. 63, 74 (1958) (*Flora* I).

It is well established that §1346(a)(1) confers subject matter jurisdiction and is a waiver of sovereign immunity, conditioned by the requirements of §7422(a). *See United States v. Williams*, 514 U.S. 527, 530 (1995). *C.f.*, *Beall*, Pet. App.21-22 (§1346(a)(1) is not a waiver of sovereign immunity but must be coupled with a claim brought under §7422(a) which waives immunity).

The Hincks cite to and complied with §7422(a), including making full payment and filing a refund claim with the IRS before filing suit.

The language in §7422(a) mirrors §1346(a)(1) and also provides for the recovery of "any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected."

Prior to the 1996 amendments, the consensus was that the plain language of §1346(a)(1), coupled with §7422(a), waives sovereign immunity and establishes district court and Claims Court subject matter jurisdiction over §6404(e)(1) refund claims. *See Selman* at 1062; and *Horton*

Homes at 550; *Kapp* at *1.[11]

The Fifth Circuit found the underlying grounds supporting jurisdiction first discussed in the early cases are just as applicable after the 1996 amendments to §6404.

A. Sections 1346(a)(1) and 7422(a) Encompass Refund Claims for Interest

Any reference to tax in the Tax Code is deemed to encompass the interest on the tax. *See* §6601(e)(1) (providing that any reference "to any tax imposed by this title shall be deemed also to refer to interest imposed by this section on such tax"). *Beall*, Pet.App. 21, n.3; *Horton Homes* at 550.

More specifically, the phrase "any sum" refers to amounts that are neither taxes nor penalties. "One obvious example of such a 'sum' is interest." *Flora v. United States,* 362 U.S. 145 (1960) ("*Flora* II").

The three types of claims for refund encompassed by the statute are read disjunctively: for tax, penalties, and "any sum." *Flora* II at 149. Therefore, taxpayers may file suit under §1346(a)(1) solely for refund of interest.

B. Sections 1346(a)(1) and 7422(a) Encompass Refund Claims for Interest Accrued as a Result of IRS Errors or Delays

Sections 1346(a)(1) and 7422(a) provide for recovery of interest that is "excessive or in any manner wrongfully collected." Unabated interest attributable to IRS errors or delays that the IRS has refused to abate is excessive and wrongfully charged.

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[11] Later authority erroneously referred to the ultimate justiciablity determinations in those cases as holding that district courts and the Claims Court lacked jurisdiction. See discussion in *Beall* at Pet. App. 26.

Excessive is defined as "exceeding the usual, proper, or normal." Webster's Third New International Dictionary 792 (1961); 5 Oxford English Dictionary 501 (2d ed. 1999) ("Exceeding what is right, proportionate, or desirable; immoderate, inordinate, extravagant."). *See also, United States v. Bajakajian*, 524 U.S. 321 (1998) (in construing the term "excessive" in the context of the Excessive Fines Clause, "Excessive means surpassing the usual, the proper, or a normal measure of proportion.").

By providing for abatement of interest accrued and assessed as a result of IRS errors or delays, Congress indicated that such interest *per se* exceeds the usual, proper, and normal interest that accrues on taxes owed and is wrongful. (Otherwise, the IRS is allowed, if not encouraged, to profit from its mistakes and delays.)

In *Beall*, the Fifth Circuit was further convinced that where the Secretary's refusal to abate interest under §6404(e)(1) amounts to an abuse of discretion, such a refusal is improper, and the improperly unabated interest is, therefore, "excessive or . . . wrongfully collected."

C. Sections 1346(a)(1) and 7422(a) Encompass §6404(e)(1) Abatement Refund Claims

Sections 1346(a)(1) and 7422(a) encompass §6404(e)(1) claims for abatement. Those provisions are statutory and not constrained by their common-law ancestor, assumpsit, which did not provide for abatement actions. *See Beall*, Pet. App. 23, *citing Williams* at 532; and *Flora* II, 362 U.S. at 635-7. As this Court explained in *Williams* and *Flora* II, an action for refund under §1346(a) is no longer regarded as a common-law assumpsit action for recovery based on fraud, duress or mistake, "but rather as a statutory remedy which 'in its nature [was] a remedy against the Government.'" As such, the broad language of this statutory remedy provides for "recovery" of "any sum," which encompasses claims for abatement and refund of interest.

D. The Trial Court Erroneously Disregarded the Claims Court's §1346(a)(1) Jurisdiction

Almost all of the precedential authority addressing district court and Claims Court jurisdiction over §6404(e)(1) claims construes §1346(a)(1). However, the Claims Court below held that the phrase "concurrent with the United States Claims Court" at §1346(a)(1) is not an independent grant of jurisdiction, but a cross-reference to Tucker Act jurisdiction at §1491. The court asserted §1491(a)(1) is the sole source of the Claims Court's tax refund jurisdiction.

The court's sole authority for that assertion is a footnote in a law review article written in 1963. M. Carr Ferguson, *Jurisdictional Problems in Tax Controversies,* 48 Iowa L.Rev. 312, n. 175 (1962-1963), *citing Eastport S.S. Corp. v. United States,* 178 Ct.Cl. 599, 372 F.2d 1002 (1967). While Mr. Ferguson's expertise is widely recognized, *Williams* at 532, in practice the jurisdictional approach suggested in the article has seen little development aside from the few authorities cited by the court below, which include that court's own recent opinions. Pet. App. Supp. at 84-5.

The court's approach to §1346(a)(1) is contrary to the general rules of statutory construction. The duty of the courts is to give effect to the intent of Congress, and the first reference is to the literal language of the statute. *Burlington No. R.R. v. Okla. Tax Comm.,* 481 U.S. 454, 461 (1987). The plain language of §1346(a)(1) is unambiguous: "The district courts shall have original jurisdiction, *concurrent with the United States Court of Federal Claims . . .*." If that phrase is not an independent grant of jurisdiction, the reference is superfluous and contrary to another basic rule of statutory construction - all parts of the statute are to be given meaning. *United States v. Menasche,* 348 U.S. 528, 538-539 (1955).

The Claims Court below erred in holding that §1346(a)(1) is not a source of jurisdiction for that court. The only rational reading is that it is a grant of jurisdiction or an interpretation of existing §1491(a) jurisdiction to include all of the types of claims recited in §1346(a)(1).

Moreover, it is the well established practice of the Claims Court and the Federal Circuit to refer to and rely upon §1346(a)(1) as a source of tax refund jurisdiction. The original unpublished Federal Circuit opinion on the §6404(e)(1) issue is based on a construction of §1346(a)(1) jurisdiction. *Kapp* at *1. Even Judge Allegra has considered claims for refund under §1346(a)(1). *See e.g.*, *Wertz v. United States*, 51 Fed. Cl. 443, 446 (Fed.Cl. 2002). *See also Roberts v. United States*, 242 F.3d 165, 167 (Fed.Cir. 2001) ("Section 1346(a)(1) provides concurrent jurisdiction for tax recovery suits in both U.S. district courts and the Court of Federal Claims."). *See also e.g.*, *Ammex, Inc. v. United States*, 384 F.3d 1368, 1370 (Fed.Cir. 2004); *Ledford v. United States* , 297 F.3d 1378, 1382 (Fed.Cir. 2002); *Foreman v. United States*, 60 F.3d 1559, 1562 (Fed.Cir. 1995) (citing §1346(a)(1), §1491(a) and §7422(a) as authority for Claims Court jurisdiction over refund actions); *Lovett v. United States*, 81 F.3d 143, 145 (Fed.Cir. 1996) (the Claims Court has jurisdiction to consider tax refund suits under §1346(a)(1)).*E.g.*, *Fuselier v. United States*, 63 F.3d 8, 11 (Fed.Cl. 2004) (the Claims Court has jurisdiction over tax refund cases, citing §1346(a)(1) and §1491).

II. The Claims Court also has §1491(a)(1) Jurisdiction Over §6404(e)(1) Claims

In the alternative, the Hincks' complaint is also based on §1491(a)(1), the Tucker Act, which confers power on the Claims Court to render judgment on:

> any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon

> any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The Tucker Act is both jurisdictional and a waiver sovereign immunity *eo nomine* for the classes of claims described therein. But §1491(a)(1) does not confer substantive rights for recovery. An action under that provision must be based on the Constitution, federal statute, or a regulation. *United States v. Mitchell*, 463 U.S. 206, 215-6 (1983).

If the Constitutional provision, statute, or regulation upon which the claim is based is encompassed by the Tucker Act, no separate waiver of sovereign immunity is required beyond the Tucker Act's consent to suit. Nor does the statute upon which the claim is based need to be construed in a manner appropriate to waivers of sovereign immunity. *Mitchell* at 218-9, *citing Emery, Bird*, 237 U.S. at 32. As Cardozo made clear, "[t]he exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." *Anderson v. John L. Hayes Constr. Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926), *cited* by *Mitchell* at 218-9.

A. Suits for Refund Under the Revenue Laws are Encompassed Under §1491(a)(1)

Since 1887, it has been well-established that suits to obtain refund of income taxes are founded upon the laws of Congress and/or regulations of an executive department, the IRS, and sovereign immunity has been waived. *Flora* I, 357 U.S at 70, *citing United States v. Emery, Bird, Thayer*

Realty Co., 237 U.S. 28 (1915).[12] And pursuant to *Mitchell*, there does not need to be a separate waiver of immunity set out in the revenue laws to bring a refund action.

The Hincks' claim is one for refund of interest under the revenue laws, specifically §6404(e)(1). Consequently, their claim fits squarely within §1491(a)(1), immunity is waived, and a second statutory waiver of immunity is not necessary.

B. Section 6404(e)(1) is Money Mandating

In the alternative to this established §1491(a)(1) refund jurisdiction, the Claims Court also has jurisdiction over the Hincks' claim because §6404(e)(1) is "money mandating." A statute is "money mandating" if it mandates compensation for damages sustained. *United States v. Testan*, 424 U.S. 392, 400 (1976).

Stated another way, a statute is money mandating if payment is mandated when the statutory conditions are met. The factors considered in making this determination include: (i) the language of the statute, particularly whether the permissive "may" is used as opposed to "shall;" (ii) indications of legislative intent to the contrary; and (iii) obvious inferences from the structure and purpose of the statute. *See McBryde v. United States*, 299 F.3d 1357, 1361-2 (Fed. Cir. 2002), *citing Doe v. United States* , 100 F.3d 1576, 1582 (Fed. Cir. 1996), and discussing changes to inferences drawn from discretionary language such as

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[12] Justice Holmes observed in construing whether a district court, sitting as a Claims Court, had jurisdiction over an action for refund of taxes under the Little Tucker Act, then codified at §24(20). Justice Holmes saw no difference in the grant of jurisdiction between the two courts and no reason why the accepted authority that claims for refund of tax are founded upon the acts of Congress and/or regulations of the executive department under the Tucker Act should not be expanded to the district courts under the Little Tucker Act, then codified at §24(20).

"may" after *United States v. Rodgers* , 461 U.S. 677, 706 (1983).

These factors parallel the factors for determining whether a statute is so discretionary that judicial review is precluded and are discussed in greater detail below. To summarize here, §6404(e)(1) provides that the IRS may abate any assessment of interest attributable to errors or delays by IRS employees or officers in performing ministerial acts. As this Court recognized in *Rodgers*, the use of the word "may" is not conclusive of discretion. In this case, legislative intent indicates Congress meant for the IRS to abate this excessive interest caused by its own errors or delays. And by expressly giving the Tax Court jurisdiction without amending the "may" language, Congress clarified that §6404(e)(1) claims are not permissive or discretionary and do create a judicially enforceable right of recovery if the statutory terms are met.

Neither the Claims Court nor the Federal Circuit addressed the Hincks' primary argument for §1491(a)(1) refund jurisdiction nor the money mandating alternative.

C. The Hincks' Claim is Not Based on the Problematic Illegal Exaction Doctrine/Rational

Instead, the Claims Court *sua sponte* dismissed the Hincks' §6404(e)(1) claims for lack of jurisdiction because there was no basis to conclude the retention of plaintiffs' funds was an "illegal exaction." Pet.App.Supp.105. Alternatively, the court concluded that abatement actions remain discretionary and not justiciable. Pet.App.Supp.105 at n.23. The court erred in its determinations.

Illegal exaction is a problematic vehicle for recovering

taxes.[13] This rational for §1491(a)(1) tax refund jurisdiction has been little used since codification of refund jurisdiction in the early twentieth century.

An "illegal exaction" involves money that was "improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation."*Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1573 (Fed.Cir.,1996), *citing Eastport* at 605. The Tucker Act provides jurisdiction to recover an illegal exaction by Government officials when the exaction is based on an asserted statutory power. *Eastport* at 605.

As can be seen from the following examples, the Hincks' refund claim is not the type usually brought as an illegal exaction, and they have not made such an assertion. Examples of illegal exactions, cited in *Aerolineas* at 1573, include: (i) money collected by enforcement of regulation that was contrary to statute, *Eversharp, Inc. v. United States,* 129 Ct.Cl. 772, 776, 125 F.Supp. 244, 247 (1954); (ii) money collected pursuant to a repealed statute, *Carriso v. United States,* 106 F.2d 707, 712 (9th Cir.1939); and (iii) recovery of money illegally collected from the plaintiff as fines under void convictions and sentences, *Mallow v. United States,* 161 Ct.Cl. 446, 450 1963 WL 8503 (1963).

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[13] The plaintiffs in *New York Life Ins. Co. v. United States*, 118 F.3d 1553 (Fed.Cir. 1997) were attempting to recover a cash bond in anticipation of an unassessed liability. Unlike refund claims, the procedure to recover a cash bond in the absence of an assessment is less well defined, and the court looked with favor on the "illegal exaction" theory on the facts of that case. The dissent asserted the plaintiffs and the majority in that case "reache[d] for the 'illegal exaction' *dicta* from *Eastport Steamship Corp.*," and the court should not have to "struggle" with the "illegal exaction notion" because "the United States Code has already provided a clear remedy to recover taxes paid without legal basis. Indeed 28 U.S.C. §1346 expressly waives sovereign immunity and provides jurisdiction [in the Claims Court] for recovery of funds paid as taxes." *New York Life* at 1561.

Illegal exaction also involves a deprivation of property without due process of law, in violation of the Due Process Clause of the Fifth Amendment to the Constitution. *Norman v. United States,* 429 F.3d 1081 (Fed.Cir.2005). This "illegal exaction" prong of *Eastport* has seen little development outside of civil forfeiture cases*i.e.*, "takings." *See e.g., Crocker v.* United States, 37 Fed.Cl. 191, 197-8 (1997). While the Hincks do assert that the net worth requirement in §6404(h) violates due process, they do not assert that the failure to remit excess interest is a "taking."

The particulars of discretion and the court's justiciability determination are discussed below.

III. The Fifth and Federal Circuit Split Destroys the Integrated Jurisdictional Plan Between the District Courts and the Claims Court

Although the Federal Circuit discussed prior §6404(e)(1) jurisdictional analysis, including *Beall*, that court did not make a direct determination with respect to §1346(a)(1) or §1491(a)(1). That court based its dismissal for lack of jurisdiction on a determination that the Tax Court has exclusive jurisdiction over §6404(e)(1) claims – a decision that erroneously repeals by implication §1346(a)(1) jurisdiction and §1491(a)(1) refund jurisdiction and directly conflicts with the Fifth Circuit's decision in *Beall*.

To paraphrase this Court, providing for expeditious and orderly determination of claims against the Government demands an integrated jurisdictional plan between the district courts and the Claims Court. Uniformity and equality in substantial rights and privileges for claimants in both forums are essential to the system. Distinctions between the opportunities for recovery afforded in the two forums mar the symmetry of the plan and impair its effective and successful operation. *Bates Mfg. Co. v. United States*, 303 U.S. 567, 570-71 (1938). The split between the Fifth and Federal Circuits over §6404(e)(1) jurisdiction

destroys this integrated plan.

IV. The Nature of Tax Court's Jurisdiction

The jurisdictional grants at §§1346(a)(1) and 1491(a)(1) are truly "broad" and "spacious" compared to the parsimonious scheme of Tax Court jurisdiction.[14]

A. Tax Court Jurisdiction Must Be Specifically Set Out in the Tax Code

The Tax Court is an Article I court possessing only such power as Congress expressly confers on it in the Tax Code. §§7441 and §7442 at Pet. App. 50; *e.g. Est. of Wenner*, 116 T.C. 284, 286 (2001); *Freytag v. Commissioner*, 501 U.S. 868 (1991); *Continental Equities, Inc. v. Commissioner*, 551 F.2d 74, 79 (5th Cir. 1977), *aff'g in part & rev'g in part* T.C. Memo 1974-189.

Consequently, the Tax Code is littered with discrete jurisdictional grants to the Tax Court that are narrowly construed and may not be expanded *sua sponte* or by the parties. *See Halpern v. Commissioner*, 96 T.C. 895 (1991), *citing Naftel v. Commissioner* , 85 T.C. 527, 529 (1985). Because the Tax Court has no jurisdiction over an issue unless there is a specific grant in the Tax Code, those grants are not, by themselves, *indicia* that the Tax Court has exclusive jurisdiction over that issue or that concurrent jurisdiction of other courts over that issue is abrogated.

B. The Tax Court's Only General Jurisdiction is Over Deficiencies

Section 6213(a) is the most "general" of the discrete

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[14] The Federal Circuit is unique among the federal appellate courts in that it alone cannot review appeals from the Tax Court. §7482(a)(1). As a result, it is rare that the Federal Circuit is required to delve deeply into the byzantine cul-de-sacs of Tax Court jurisdiction, particularly the exceptions to Tax Court jurisdiction at issue here.

jurisdictional grants to the Tax Court, and the one that most closely corresponds to §1346(a)(1) and §1491(a)(1). Section 6213(a) grants the Tax Court jurisdiction to review deficiency cases. A deficiency is the amount by which the tax imposed exceeds the amount shown by the taxpayer on his return, plus any previous adjustments, less any rebates. §6211. A deficiency can informally be thought of as the amount of additional tax the IRS says a taxpayer owes.

The Secretary is required to mail a notice of deficiency to the taxpayer before assessing the additional tax. A notice of deficiency is a prerequisite to the Tax Court's deficiency jurisdiction. §6212. Once a notice of deficiency is issued, the taxpayer can elect to file a pre-payment petition with the Tax Court for a redetermination of the deficiency. §6213.

C. Section 6213 Jurisdiction Does Not Include Interest or Refund Determinations

Section §6601(e) states that interest is to be paid, assessed, and collected in the same manner as tax, and that any reference to tax also includes interest. However, §6601(e) specifically excepts interest from the definition of a deficiency and the Tax Court's deficiency jurisdiction. §§6211 and 6213(a).

Consequently the Tax Court's general jurisdiction is limited to deficiencies, *i.e.*, unassessed tax. The well-established general rule is that the Tax Court lacks jurisdiction to determine interest and refunds (overpayments). *See Bax* at 56-57; *LTV Corp. v. Commissioner*, 64 T.C. 589, 597 (1975); *see also Asciutto v. Commissioner*, T.C. Memo.1992-564, *affd.* 26 F.3d 108 (9th Cir.1994); *White v. Commissioner*, 95 T.C. 209, 213-4 (1990).

This key point distinguishes the three courts at issue. The district courts and Claims Court have refund jurisdiction over claims for tax and interest that has been assessed and paid. The Tax Court generally does not. There

are limited exceptions to this general rule.

Under §6512(b), once the Tax Court acquires §6213 jurisdiction to redetermine a deficiency, it also acquires supplemental jurisdiction to determine income tax overpayments for that tax year. *See Estate of Baumgardener v. Commissioner*, 85 T.C. 445 (1985); *Barton v. Commissioner*, 97 T.C. 548, 554-555 (1991); *Winn-Dixie Stores, Inc. & Subs. v. Commissioner*, 110 T.C. 291 (1998). But, if the Tax Court lacks jurisdiction over the underlying grounds for the petition, the Tax Court also lacks §6512(b) overpayment jurisdiction *Greene-Thapedi v. Commissioner*, 126 T.C. 1 (2006) (because deficiency had been satisfied by levy, the taxpayer's §6330(d) collection due process action was moot, the Tax Court lacked jurisdiction over the case and, therefore, could not determine overpayments)

Other exceptions are former §6621(c) and §7481(c). Former §6621(c)(4) allows the Tax Court to make §6621(c) tax motivated transaction interest determinations.[15] Section 7481(c) grants the Tax Court continuing limited jurisdiction to reopen a deficiency case to determine the interest on the deficiency in the original proceeding.

In none of these instances does the grant of Tax Court jurisdiction in the Tax Code withdraw, bar, or repeal the existing refund jurisdiction of the district courts or the

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[15] *See Lincir v. Commissioner*, 115 T.C. 293, 298-300 (2000). Former §6621(c) was repealed by §7721(b) of the Omnibus Budget Reconciliation Act of 1989, Pub.L. 101-239, 103 Stat. 2106, 2399, effective with respect to returns the due date for which is after December 31, 1989. Section 6621(c) interest is at issue in most of the AMCOR partner cases, including *Weiner*, but not here as to Hinck or as to Beall. The Government has never challenged district court or Claims Court jurisdiction to review §6621(c) interest refund claims on the grounds that §6621(c)(4) grants exclusive jurisdiction to the Tax Court.

Claims Court.

D. An Express Grant in the Tax Code Was Required to Establish Tax Court Jurisdiction Over §6404(e)(1) Claims

Prior to 1996, the Tax Court held it lacked any jurisdiction with respect to §6404(e)(1) abatement claims. *See 508 Clinton St., supra.* Subsequent courts also held that the exceptions to the general rule could not be expanded *sua sponte* to encompass §6404(e)(1) claims. *Bax* at 58; *Ho v. Commissioner*, T.C.Memo 1998-363. Pre-1996 authority unanimously held that the Tax Court could not review §6404(e)(1) cases without a specific statutory grant of jurisdiction, which Congress had not granted when it enacted §6404(e) in 1985. *Bax* at 58; *Melin v. Commissioner*, 54 F.3d 432, 434 (7th Cir. 1995).

In the 1996 TBOR2, Congress amended §6404 to add a specific grant of Tax Court jurisdiction over §6404 claims. Section 6404(h) gives the Tax Court jurisdiction over any action brought by taxpayers who meet certain net worth and other requirements to determine whether the IRS's failure to abate interest as provided in §6404 was an abuse of discretion. Pet. App. 42. This jurisdiction is not limited to §6404(e)(1) claims, but also encompasses the other interest abatement provisions at §6404 as well.

V. The Tax Court Does Not Have Exclusive Jurisdiction Over §6404(e)(1) Claims

The Federal Circuit erred in holding that Congress vested in the Tax Court "exclusive jurisdiction over interest abatement claims, and thus withdrew subject matter jurisdiction from all other courts over those claims." Pet. App. 15.

A. The Plain Language of §6404(h) Does Not Vest the Tax Court With Exclusive Jurisdiction

Section 6404(h) does not use the term "exclusive" or otherwise indicate that the Tax Court's jurisdiction is exclusive. Nor is there any language in the other amendments to §6404 indicating that the Tax Court's jurisdiction over interest abatement actions is exclusive.

When Congress intends to make a remedy exclusive to a particular court, it makes its intention clear. For example, in the event of unauthorized disclosures the "*exclusive* civil remedy [is] an action . . . in the . . . United States Court of Federal Claims . . . ." §6110(j) at Pet. App. 40, emphasis added. Section 7482(a)(1) expressly states that the "United States Courts of Appeals (other than the . . . Federal Circuit) shall have *exclusive* jurisdiction to review the decisions of the Tax Court, ..." Emphasis added.

The Federal Circuit's conclusion that the Tax Court has exclusive jurisdiction over interest abatement claims is based largely on the absence of language expressly granting jurisdiction to the district courts and Claims Court. Applying the same logic, the district court in *Beall* reasoned, "Congress would certainly have specifically provided for federal court jurisdiction in 6404(i) [now §6404(h)] if it intended the federal courts, not simply the Tax Court, to review interest abatement claims. . . . [T]he plain wording of 6404(i) vests jurisdiction to review interest abatement decisions solely in the Tax Court." 170 F.Supp.2d at 712. The Fifth Circuit did not agree and reversed.

But, as discussed above, this Court has clearly stated that if a claim is based on a statute encompassed by the Tucker Act there does not need to be a second draft of jurisdiction or waiver of sovereign immunity. *Mitchell* at 218-19. The same analysis should extend to §1346(a)(1).

This argument, that a grant of jurisdiction to the Tax Court is exclusive based on the absence of a reference to other courts, is only applicable if there is no other existing concurrent or overlapping jurisdiction in another court. For example, any person who has received notice that the IRS intends to disclose information may file a petition in the Tax Court for a preemptive determination. §6110(f)(3). Any person who requests disclosure of information may file a petition in the Tax Court or a complaint in the district court for the District of Columbia. §6110(f)(4). The grants of jurisdiction in those provisions can reasonably be read as exclusive because unauthorized disclosure actions do not fit within §1346(a)(1)'s general refund jurisdiction.

Also, if the Tax Court has "jurisdiction of the underlying tax liability" then appeal from the determinations of a §6320/6330 collection due process hearing must be made to the Tax Court. §6330(d); Treas. Reg. §301.6330-1T(F)(2); *Bartschi v. Tracy*, 2001-2 U.S.T.C. ¶50,672, 2001 WL 1338795, *3 (D. Ariz. 2001) and authorities cited therein. *See also Greene-Thapedi v. Commissioner*, 126 T.C. 1 (2006). The Tax Court has exclusive jurisdiction over appeals from collection due process hearings not because Congress stated its jurisdiction was exclusive, but because there is no other existing concurrent or overlapping jurisdiction in another court.

Congress makes its intention clear when it limits or circumscribes existing jurisdiction. For example, §7422(h) limits the §7422(a) waiver of sovereign immunity over refund actions. Refunds attributable to partnership items can only be brought within the limits set out at §6228(b) or §6230(c). Nothing in the 1996 amendments limited or even addressed the existing, acknowledged district court and Claims Court jurisdiction.

In the absence of express language granting the Tax

Court "exclusive" jurisdiction over §6404(e) claims (as with unauthorized disclosure actions) or clarifying that the district courts and the Claims Court are barred from exercising their existing jurisdiction (as with §7422(h) and the sequential jurisdiction set out for levy determinations or the §7482(a)(1) express bar precluding the Federal Circuit from reviewing Tax Court cases), no inference can or should be made regarding existing district court and Claims Court jurisdiction simply because of the grant of jurisdiction to the Tax Court.

B. Implied Repeal of Existing Federal Court Jurisdiction is Disfavored

The Fifth Circuit correctly recognized that when viewed against a proper reading of the *Horton Homes* cases -- the district courts and the Claims Court have jurisdiction over §6404(e)(1) claims – holdings such as those by the Claims Court and Federal Circuit below essentially become a claim that Congress, in granting jurisdiction to the Tax Court to review interest abatement denials without mentioning the existing jurisdiction of the other courts, impliedly repealed that existing jurisdiction. Pet. App. 34.

But it is a "cardinal rule" of statutory construction that "repeals by implication are not favored." *Morton v. Mancari,* 417 U.S. 535, 549-550 (1974); *Wood v. United States,* 16 Pet. 342, 363, 10 L.Ed. 987 (1842); *Jackson v. Stinnett,* 102 F.3d 132, 135 (5th Cir.1996) ("It is hornbook law that 'repeals by implication are not favored.' ") (quoting *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 442 (1987)).

Congressional silence will not be deemed to effectuate a repeal by implication unless the legislative history contains an affirmative indication that Congress intended to repeal. *Morton* at 550. In the absence of some affirmative showing of intent to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. *Georgia v.*

Pennsylvania R. Co., 324 U.S. 439, 456-57 (1945). This would be the case if the later statute expressly contradicts the original act or if implicit repeal is absolutely necessary for the later statute to have any meaning at all. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). The courts are not at liberty to pick and choose among congressional enactments. And when two statutes are capable of co-existence, it is the duty of the courts, absent clearly expressed congressional intent to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible .... The intention of the legislature to repeal 'must be clear and manifest.'" *Morton* at 551, *quoting United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

When Congress enacted the §6404(h) grant of Tax Court jurisdiction, it remained silent as to existing district court and Claims Court refund jurisdiction except to say that no inferences should be drawn. Pet. App. 63. The grant of jurisdiction to the Tax Court and the existing refund jurisdiction of the district courts and the Claims Court are easily reconciled within the established framework for tax controversies. Congress expressed no "clear and manifest" affirmative indication that it intended to repeal the existing §§1346(a)(1), 1491(a)(1), and 7422(a) refund jurisdiction of the district courts and the Claims Court. Therefore, the Federal Circuit below erred when it picked and chose between reconcilable congressional enactments capable of co-existence and did not regard each as effective.

C. Exclusive Jurisdiction is Inconsistent with the Legislative Scheme for Tax Controversies

In *Flora* II, the Government urged this Court to adopt the same alleged "plain language" approach the Federal Circuit applied in *Hinck*, *i.e.*, that the absence from the grant of Tax Court jurisdiction of an express reaffirmation

of the existing jurisdiction of other courts is conclusive proof that that jurisdiction does not exist. This Court declined, noting that if the statutory language alone was so clear, then presumably the courts "could but recite the statute and enter judgment" and "might be pardoned some perplexity as to how such a simple matter could have caused so much confusion." *Flora* II at 148. But this Court recognized that "this facile an approach will not serve" with respect to a question of such considerable importance in the administration of the tax laws. *Flora* IIat 148.

As this Court noted in construing §1346(a)(1), "[w]e are not here concerned with a single sentence in an isolated statute, but rather with a jurisdictional provision which is a keystone in a carefully articulated and quite complicated structure of tax laws." *Flora* II at 157.

The entire structure of tax controversy jurisdiction is built on a basic scheme. The Tax Court has almost exclusively been granted jurisdiction to hear deficiency disputes, with only very limited grants of jurisdiction regarding other types of issues, including interest and post-payment refund actions. In contrast the district courts and Claims Court have very broad post-payment refund jurisdiction, but very limited pre-payment jurisdiction, such as rarely granted injunctive relief.

This Court recognizes that one of the principal, if not *the* principle, reasons Congress created the predecessor of the Tax Court, was to provide the taxpayer with a means of avoiding the hardship inherent in being forced to first pay the asserted tax before seeking a judicial review of the assessment. *Flora* II at 158. This Court relied on the express legislative history in the House Committee Report explaining the Board's purpose:

> The committee recommends the establishment of a Board of Tax Appeals to which a taxpayer may appeal prior to the payment of an additional

> assessment of income, excess-profits, war-profits, or estate taxes. Although a taxpayer may, after payment of his tax, bring suit for the recovery thereof . . . [t]he right of appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous . . . sometimes forces taxpayers into bankruptcy, and often causes great financial hardship and sacrifice. These results are not remedied by permitting the taxpayers to sue for the recovery of the tax after this payment. He is entitled to an appeal and to a determination of his liability for the tax prior to its payment.

H.R.Rep. No. 179, 68th Cong., 1st Sess. 7. See also, S.Rep. No. 398, 68th Cong., 1st Sess. 8.

In *Flora I*, this Court recognized this bifurcated tax controversy scheme, *i.e.*, that the statutory nature of Tax Court jurisdiction and §1346 jurisdiction create "a system in which there is one tribunal for *pre-payment* litigation and another for *post-payment* litigation . . ." *Flora* I at 163 (emphasis added.). The logic of this statutory scheme has been endorsed by the appellate courts. See also the *Poretto* "pay and sue" directive. *Poretto v. Usry*, 295 F.2d 499, 501-02 (5th Cir. 1961) and *Rotenberry v. Commissioner*, 847 F.2d 229, 230 (5th Cir. 1988).

To hold that a grant of jurisdiction in the Tax Code automatically grants the Tax Court exclusive jurisdiction overlooks the statutory nature of Tax Court authority, ignores the basic bifurcation of pre- and post- payment actions, and is without authority.

This distinction between pre- and post- payment jurisdiction is carried over to the statutes of limitation. For example, the statutes of limitation for a pre-payment suit

in the Tax Court are consistently much shorter than those for a refund suit in other courts. Section 6213(a) grants the Tax Court jurisdiction to address pre-payment disputes over tax deficiencies if the Tax Court petition is filed within 90 days after the notice of deficiency is issued. In the 1996 grant of Tax Court jurisdiction, Congress mirrored this abbreviated pre-payment limitations period by restricting the period to file a §6404(e) interest abatement petition in the Tax Court to 180 days after the IRS formally denies the §6404(e)(1) refund claim.

In *Beall*, the Fifth Circuit examined the general jurisdictional scheme and held that reading the grant of jurisdiction to the Tax Court as automatically excluding district court refund jurisdiction was inconsistent with the general structure of the Tax Code and the limited jurisdiction of the Tax Court. Pet. App. 20-26.

D. The Legislative History Does Not Support Exclusive Tax Court Jurisdiction

The legislative history to the 1996 amendments does not indicate Congress intended for the Tax Court to have exclusive jurisdiction over §6404(e)(1) claims. *See* H.R. Rep. No. 104-506, at 28 (1996). Pet.App.62-63. While that House report discusses the Tax Court's jurisdictional grant, it does not expressly say or overtly infer that that grant is exclusive.

On the other hand, the statement of present law in the report indicates Congress was aware of the *Horton Homes* line of cases. Pet. App. 63 ("Federal courts generally do not have the jurisdiction to review the IRS's failure to abate interest.") Congress is presumed to know the law and to have realized the prior authority had actually held the district courts and Claims Court (but not the Tax Court) had jurisdiction, but were precluded from exercising it and why. Like later §6404(e)(1) authorities, Congress instead misapplied the term "jurisdiction." As the Fifth Circuit

noted, jurisdiction is a word of too many meanings. *See, e.g., Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83 (1998) (quoting *United States v. Vanness,* 85 F.3d 661, 663 n. 2 (D.C.Cir.1996)).

Moreover, after affirmatively demonstrating it was aware of the then-current state of the law, Congress clarified and resolved each of the issues on which the federal courts determined justiciability. Congress clarified that IRS abatement decisions were not totally discretionary by granting the Tax Court jurisdiction to review those decisions. Congress also clarified that those IRS determinations should be reviewed for abuse of discretion.

After answering all of the previous objections, Congress did not take the obvious next step to preclude the exercise of jurisdiction by the other federal courts. Congress did not state that the district courts and Claims Court *did not* have jurisdiction to review interest abatement denials. Instead, the House report clearly states that "[n]o inference is intended as to whether under present law any court has jurisdiction to review IRS's failure to abate interest." Pet.App. 63.

The Federal Circuit made just such an inference and then erroneously buttressed its conclusions with ambiguous language in legislative history to the proposed, but never passed, Taxpayer Bill of Rights 2000. H.R.Rep. No. 106-566, at 32 (2000). Pet. App. 14-15, 64. The legislation to which that report relates, H.R. 4163, was never enacted.[16] As this Court has said, "unenacted approvals, beliefs, and desires are not laws." *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.,* 485 U.S. 495, 501 (1988). *See also Ratzlaf v. United States,* 510 U.S. 135, n.18 (1994) ("We do not find

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[16] H.R. 4163 passed the House on April 11, 2000, and was referred to the Senate on April 12, 2000. The legislation never left the Senate Finance Committee.

that Report, commenting on a bill that did not pass, a secure indicator of congressional intent at any time, and it surely affords no reliable guide to Congress' intent in 1986. See *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979) (cautioning against giving weight to 'history' written years after the passage of a statute)"). To borrow from Justice Scalia, "[t]oday's opinion ever-so-carefully analyzes, not legislative history, but the history of legislation-that-never-was. . . . This is beyond all reason, and we should say so." *United States v. Estate of Romani*, 523 U.S. 517, 536 (1998) (SCALIA, J., concurring in part and concurring in judgment).

E. Assumed Expertise is No Basis on Which to Infer Exclusive Jurisdiction

The Federal Circuit buttressed its exclusivity determination by observing that the Tax Court is a specialized court with expertise in tax matters, and concluded it is suited to address this issue. Pet. App. 12-13. Tax Court judges may have more specialized knowledge of complex substantive tax statutes, but they have no specialized expertise in recognizing an abuse of discretion in denying an interest abatement request.

While the Hincks are confident that Tax Court judges are imminently qualified and knowledgeable in the area of substantive tax law, the issues raised with respect to §6404(e)(1) abatement determinations do not turn on the intricacies of tax law, but whether IRS officers or employees erred or delayed in performing ministerial acts. Treas. Reg. §301.6404-2T(b)(1); *Leffert* at 1097-98. Final regulations under §6404 were issued Dec. 18, 1998, see Treas. Reg. §301.6404-2(b)(2). The Tax Court is no better qualified to review and evaluate the IRS's mechanical or procedural acts than the district courts or the Claims Court. Moreover, it has never been contended that Tax Court pre-payment jurisdiction to review tax deficiencies allegedly arising from

complex substantive tax issues automatically repeals refund jurisdiction of the district courts and the Claims Court over those same complex disputes. Finally, Tax Court pre-payment cases are appealable to the same Circuit Courts as the district courts who would hear the case in a refund action. *Golsen v. Commissioner*, 54 T.C. 742, 756-57 (1970), *aff'd*, 445 F.2d 985 (10th Cir.), *cert. denied*, 404 U.S. 940 (1971). The unavoidable conclusion is that §6404(e)(1) should be reviewed by the district courts and the Claims Court in refund cases using the same standard the Tax Court uses in pre-payment cases and that district courts and the Claims Court currently use to review other "discretionary" acts by the IRS.

VI. The Claims Court Erroneously Followed Pre-TBOR2 Cases to Hold That §6404(e)(1) is Totally Discretionary Because The Provision Was Not Judicially Manageable

The *Horton Homes* line of cases ultimately held the IRS's refusal to refund interest under §6404(e)(1) is (i) purely discretionary because Congress used "may" instead of "shall" in describing the IRS's authority, and (ii) not reviewable because §6404(e)(1) has no standards to apply in reviewing the IRS's decision and no directives or guidelines the IRS must follow when reviewing requests for abatement other than that the IRS should permit abatement "where failure to abate interest would be widely perceived as grossly unfair." *Brahms v. United States*, 18 Cl.Ct. 471, 475-77 (1989). When stripped to its essentials, the Claims Court below erroneously rested its holding on the same determination.

A. Pre-TBOR2 Cases Erroneously Relied on the APA

The taxpayers in *Brahms*, *Selman*, and *Horton Homes* sought a refund of interest under §6404(e)(1) and attempted to recover pursuant to §1346(a)(1), and/or §1491(a)(1), and

§7422(a). Also relying on the Administrative Procedures Act ("APA"), codified at 5 U.S.C. §§701-706, the taxpayers in *Brahms*, one of the earliest §6404 cases, filed suit without first paying the assessment and filing a refund claim. The Claims Court dismissed based on its APA analysis. In *Selman* and *Horton Homes*, the taxpayers did pay and file refund claims, but their actions were also ultimately dismissed based on an APA analysis. *Brahms* at 550-552; *Selman* at 1064; and *Horton Homes* at 554.

Sections 1346(a)(1), 1491(a)(1), and 7422(a) were in place when Congress enacted §6404(e)(1) in 1978. These provisions provide an independent source of jurisdiction and waiver of sovereign immunity over tax refund actions. The Hincks do not base their claim on the APA. Both the Fifth Circuit and the Claims Court below have held that §6404(e)(1) claims for refund are not subject to the APA.

B. Early §6404(e)(1) Cases Concluded Judicial Review Was Precluded

In declining to make §6404(e)(1) determinations, *Brahms*, *Selman*, *Horton Homes*, and the other pre-TBOR2 cases all relied on Supreme Court analysis of APA §701. *Brahms* at 475; *Selman* at 1063, *citing Webster v. Doe*, 486 U.S. 592, 599 (1987). The Supreme Court has explained that judicial review is precluded under §701 if Congress expressly prohibited judicial review, or "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" §701(a)(1); §701(a)(2); *Argabright* at 476, *citing Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (the §702(a)(2) exception is triggered only "in those rare instances where 'statutes are drawn in such broad terms that there is no law to apply.'"). *See also Selman* at n.10. The APA codified well-established common law rules of judicial preclusion, and the analysis is equally applicable to non-APA cases.

The pre-TBOR2 cases recognized the presumption in favor of judicial review of agency actions and that this presumption can only be overcome by clear and convincing evidence of contrary legislative intent. *Brahms* at 475; *Argabright* at 476; *Selman* at 1064; *Horton Homes* at 551.

The prior lines of §6404 authority all recognized that judicial review was not expressly prohibited by the statute. Instead, *Selman*, *Horton Homes, and Brahms* all held judicial review of §6404(e)(1) claims was barred because §6404(e)(1) was drawn so broadly that there was no meaningful standard against which to judge the agency's exercise of discretion. This analysis simply does not apply after TBOR2, where Congress expressly acknowledged a right to judicial review without substantially changing the language of the statute.

C. TBOR2 Invalidates All Prior Grounds for Supporting Total IRS Discretion

Spurred by widespread reports of IRS misconduct, in 1996 Congress enacted TBOR2 to provide for increased taxpayer protection. The amendments to §6404 in TBOR2 prove that Congress did not intend interest abatements to be entirely discretionary with the IRS, whether or not that finding was reasonable when *Brahms*, *Selman*, *Horton Homes*, *etc.* were first decided. The amendments overcome each argument the pre-TBOR2 cases relied upon. Consequently, the district courts and the Claims Court are not barred from exercising their jurisdiction.

1. TBOR2 Adopts the Common Law Standard of Review

Both *Selman* and *Horton Homes* concluded that there was no "meaningful" or "judicially manageable standard" to review IRS determinations. *Brahms* is based on a similar determination.

But in TBOR2 Congress made it clear that there is a meaningful standard for judicial review by directing the

Tax Court to review §6404(e)(1) determinations for "abuse of discretion." The Tax Court holds the IRS abuses its discretion if its denial is arbitrary, capricious, or without sound basis in fact or law. See *Lee v. Commissioner*, 113 T.C. 145, 149 (1999). The district courts and Claims Court already apply this same standard in APA cases and are directed to hold unlawful and set aside agency actions, findings, and conclusions that are "arbitrary, capricious, *an abuse of discretion*, or otherwise not in accordance with the law." 5 U.S.C. §706, emphasis added; *Advanced Data Concepts, Inc. v. United States*, 216 F.3d 1054, 1057 (Fed. Cir. 2000). Therefore, this standard is clearly manageable by district courts and the Claims Court.

Other discretionary IRS decisions are routinely reviewed even though the statutes do not expressly state the standard of review. For example, the IRS "may" waive the §6659 valuation overstatement penalty, the §6660 valuation understatement penalty, and the §6661 substantial underpayment penalty. if the taxpayer establishes reasonable cause and good faith. [17] These §§6659, 6660, and 6661 penalties and other discretionary waivers are reviewed for abuse of discretion. *See Heasley v. Commissioner*, 902 F.2d 380 (5th Cir. 1990).

2. The Statute is Not Too General

The *Selman* court erroneously believed that the statute does not provide "any basis for distinguishing between the instances in which abatement should and should not be granted." *Selman* at 1063. It was persuaded by portions of the legislative history for §6404(e)(1) that state abatement should only "be utilized in instances where failure to abate interest would be widely perceived as grossly unfair," which it believed was too "amorphous" to provide a reviewing

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[17] All three penalties have since been repealed but remain applicable for tax returns due prior to 1990.

court with subjective standards by which to evaluate agency action. *Selman* at 1063. But the original legislative history illustrates the *Selman* court may have erred and leads directly to the approach taken by the Tax Court today, not to unfettered IRS discretion:

> The provision applies *only* to failures to perform *ministerial* acts that occur after the taxpayer has been contacted by the IRS . . . . The committee intends that the term "ministerial act" be limited to *nondiscretionary acts where all of the preliminary prerequisites, such as conferencing and review by supervisors*, have taken place. Thus, a ministerial act is a procedural action, not a decision in a substantive area of tax law.

Horton Homes at 551, *quoting* Report of the Committee on Ways and Means of the House of Representatives on H.R.Rep. 3838, 99th Cong., 1st Sess. 844, 844-45 (1985). [Italicized emphasis in original, underlined emphasis added.]

Congress obviously believed §6404(e)(1) is straightforward and "errors or delays" is not too quixotic or generalized when it directed the Tax Court to review those same "errors or delays" in TBOR2.[18] Whether *Selman* was in error then, it is clearly inapplicable after TBOR2.

As the Tax Court has determined, the issue is whether an officer or employee erred or delayed *in performing a ministerial act.* See *Leffert* at 1097-98. By reading the statute in its entirety, the Tax Court avoided the truncated

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[18] In the 1996 amendments Congress inserted "unreasonable" before "errors and delays" and expanded the scope of the statute to include managerial acts as well. P.L. 104-168, §301(a)(1)-(2) of TBOR2. See the current version of §6404(e)(1). However, those amendments only apply to tax years after 1996 and not to this action. P.L. 104-168, §301(c) of TBOR2.

reading that led to the opinion of the *Selman* court.

Morevoer, the regulation includes detailed examples with explanations of the kinds of errors or delays in performing ministerial acts, the accrued interest for which the IRS should abate. Treas. Reg. §301.6404-2T(b)(1).

In *Horton Homes*, the Eleventh Circuit evaluated the merits of that case using the same approach set out in the regulation that the Tax Court uses today. *Horton Homes* at 552. *Horton Homes* concluded it was not possible to reach a final determination on the merits of the request for abatement based on the record in that appeal – not that the statute or regulatory definition was unworkable.

The issue is simply whether an officer or employee erred or was dilatory in performing a procedural or mechanical act. In the Tax Court, review is straightforward – did the taxpayer identify and support specific instances of IRS errors or delays in performing ministerial or managerial acts. If so, then it is an abuse of discretion for the IRS to refuse to abate interest. If not, then there is no abuse of discretion. *E.g.*, *Goblirsch v. Commissioner*, T.C.Memo. 2005-78; *Bartelma v. Commissioner*, T.C.Memo. 2005-64. The Fifth Circuit was not persuaded that district courts are less competent than the Tax Court to make this determination. The Claims Court is no less competent.

3. The "May" Versus "Shall" Distinction is Now Moot

Pre-TABOR2 authorities also determined that abatement was discretionary because it used the permissive "may." This argument is no longer persuasive. Congress directed the Tax Court to review §6404 abatement determinations without amending that term. Moreover, §6404(h) grants the Tax Court jurisdiction over interest abatement in "this section," which also includes §6404(a), (c), (d), (f), and (g). Several of these subsections also include the term "may," but no assertion that they are discretionary

has been made.

After *Brahms*, there has been a clarification, or subsequent change, in the law on this "may" vs. "shall" issue. This Court's holding in *Rodgers* clarified that "may" is no longer *per se* indicative of total discretion but implies some degree of discretion that can be defeated by indications of legislative intent to the contrary and by obvious inferences from the structure and purpose of the statute. 461 U.S. at 706.

Applied to §6404(e)(1), since TBOR2 the "may" in §6404(e)(1) is not *per se* determinative. Legislative intent, the structure of the statute, the extra ordinary expansion of the Tax Court's pre-payment jurisdiction to permit judicial review of the IRS's refusal to abate interest under §6404(e)(1), and the structure of the tax controversy scheme as a whole indicate §6404(e)(1) abatements cannot be totally discretionary. Consequently, §6404(e)(1) is money-mandating for purposes of establishing jurisdiction under §1491(a)(1) and is judicially reviewable despite the word "may." Consequently, the Tucker Act also supplies jurisdiction and a waiver of immunity over the action.

D. Total IRS Discretion Is Rare

The Tax Code is replete with examples of exacting procedures the IRS must follow and opportunities for taxpayers to be assessed with or relieved of tax, interest, or penalty liability. A simple word search of the Tax Code returns over 470 discretionary provisions in the Tax Code that state the "Secretary may." Sections 6659, 6660, and 6661 allow the IRS to abate penalties at the Secretary's discretion. Those discretionary abatements are routinely reviewed in civil suits in the Tax Court, district courts, and the Claims Court. *See Mailman v. Commissioner*, 91 T.C. 1079 (1988); *Heasley, supra.*

Counsel has been unable to locate *any* provisions in the

Tax Code perceived to be so totally discretionary that judicial review is barred. Section 7122 offers-in-compromise were once perceived to be completely discretionary and barred from judicial review. But that is no longer true, if it ever was. The Tax Court now reviews denials of §7122 offers-in-compromise submitted in a collection due process hearing under an abuse of discretion standard. §§6320 and §6330. *Lunsford v. Commissioner*, 117 T.C. 183, 185 (2001).

Section 7122(a) authorizes the IRS to "compromise any civil or criminal case arising under the internal revenue laws." This includes abatement of both tax and interest. §7122. Offers-in-compromise are a common method of attempting to obtain IRS tax and interest relief. This is probably part of what Congress was referring to in the history to TBOR2 when it acknowledged that "[f]ederal courts *generally* do not have jurisdiction to review the IRS's failure to abate interest." Emphasis added. However, in its ongoing attempt to make the IRS accountable when it fails to reasonably exercise provisions intended to grant taxpayer relief, Congress made the denial of an offer-in-compromise received in a newly created collection due process hearing under §§6320 and 6330 reviewable by the Tax Court before payment on an abuse of discretion standard. Internal Revenue Service Restructuring and Reform Act of 1998, P.L. 105-206; *Lunsford* at 194.

Relying on the same analysis as *Argabright*, *Selman*, and *Horton Homes*, the IRS had asserted that §6015(f) equitable innocent spouse relief was totally discretionary and judicial review was barred. But, in *Butler v. Commissioner*, 114 T.C. 276 (2000), the Tax Court rejected the IRS's argument that its authority to grant equitable relief was totally discretionary. See *Butler* at 290-91; *cf. In re Mira*, 245 Bankr. 788 (Bankr. M.D. Pa. 1999). It recognized that the "committed to agency discretion" exception to the general rule of judicial review is very narrow and applies only in those rare instances where the

statute is drawn in such broad terms that there is no law to apply. The Tax Court recognized that review of §6015(f) "does not involve political, economic, military, or other managerial choices not susceptible to judicial review." *Butler* at 291.

In *Butler*, the IRS also argued that there was no ascertainable standard upon which to review the discretionary denial of equitable relief. The Tax Court determined the "facts and circumstances" test set out in the plain language of §6015(f) did not differ from the "facts and circumstances test" used to evaluate claims under other Code sections. It held that: "accordingly, we are well equipped to decide whether it was an abuse of discretion for [the IRS] to deny relief to petitioner under §6015(f)." *Butler* at 291-292.

Subsequent opinions in the Tax Court and Claims Court all followed the *Butler* analysis and holding. *Fernandez v. Commissioner*, 114 T.C. 324 (2000); *Charlton v. Commissioner*, 114 T.C. 333 (2000); *Flores*, 51 Fed. Cl. 49 (2001). The IRS acquiesced and has abandoned this challenge to §6015(f). Chief Counsel Notice (6/5/2000) Change in Litigating Position.

VII. The Federal Circuit's Decision Denies Taxpayer's Due Process

Both Circuits recognized that repealing the existing §6404(e)(1) refund jurisdiction of the district courts and Claims Court would cause two anomalies: (i) a taxpayer's right to judicial review of the IRS's abatement denials would be determined solely by his net worth, and (ii) certain taxpayers would be forced to "split" their claims. Pet. App. 16-17, 36-37. Further, the plain language of the statutes authorizing Tax Court jurisdiction would even deny judicial review to most of those taxpayers who do meet the net worth requirements. The Federal Circuit found the first two anomalies acceptable and chose to ignore the third. But all

three violate taxpayer rights to constitutional due process.

A. The Federal Circuit's Interpretation Would Violate the Constitutional Due Process Rights of Many Taxpayers

Section 6404(h) limits Tax Court jurisdiction over §6404(e) claims to only "action[s] brought by a taxpayer who meets the requirements . . . in §7430(c)(4)(A)(ii)." Pet. App. 42. Section 7430(c)(4)(A)(ii) mandates the taxpayer meet "the requirements of [28 U.S.C.] §2412(d)(2)(B)." Pet. App.49. Section 2412(d)(2)(B) provides, *inter alia*, that "'party' means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) [other entities, including corporations] the net worth of which did not exceed $7,000,000 at the time the civil action was filed . . . ." Pet. App. 54.

If §6404(h) gave the Tax Court exclusive jurisdiction over all §6404(e)(1) claims, then individual taxpayers with a net worth of under $2,000,000 would be allowed judicial review in the Tax Court, but taxpayers with a net worth of over $2,000,000 "would be left entirely without recourse." Pet. App. 4, 16, 36 fn. 15, 37. The Fifth Circuit found this denial of rights based solely on personal wealth unacceptable. Pet. App. 37. In *Hinck*, the Federal Circuit rejected the Fifth Circuit's concerns and stated that by granting prepayment review in the Tax Court but restricting it to "certain taxpayers," Congress intended to deny taxpayers with a net worth of over $2,000,000 not only a prepayment forum but any forum whatsoever by simultaneously repealing the existing, *albeit* previously unavailable, refund jurisdiction of the district courts and Claims Court. Pet. App. 16.

The record in this case does not contain any findings regarding the Hincks' net worth. Nor were any such findings made in *Beall* or *Weiner*. There is nothing in any of these cases to indicate that these particular taxpayers, or

any other AMCOR partner, *could* have pursued their claim in the Tax Court.

But the Federal Circuit went further by ignoring that §2412(d)(1)(B) additionally restricts Tax Court jurisdiction to only taxpayers who "submit to the court an application for fees and other expenses which shows that the party is a prevailing party." Pet. App. 54.

The statutes plainly state that the Tax Court's §6404 jurisdiction is restricted to taxpayers who meet the net worth requirements *and*

> (i) are a "prevailing party" [§7430(c)(4)(A)] seeking "reasonable administrative costs" [§7430(a)(1)] and/or "reasonable litigation costs" [§7430(a)(2)] for "any administrative or court proceeding . . . in connection with the determination, collection, or refund of any tax, interest, or penalty under this title [26 U.S.C.];" [§7430(a)] and
>
> (ii) timely submit to the court their "application for fees and other expenses" showing the amount sought and that they are "a prevailing party." [§2412(d)(1)(B)]

Pet. App. 49, 54.

If these express restrictions are upheld as well as the net worth requirements, very few taxpayers will ever qualify for judicial review in the Tax Court.

Neither the Hincks, the Bealls, nor Weiner were "prevailing parties" seeking "fees and other expenses." Under the plain language of the statutes, all of them would have been barred from filing their §6404(e)(1) abatement refund claims in the Tax Court because theirs could not be claims over which the Tax Court could have jurisdiction, exclusive or otherwise.

The only courts with clear statutory authority over the partners' §6404(e)(1) claims were the district courts and the Claims Court under §1346(a)(1), §1491(a)(1), and §7422(a). Even if they met the net worth requirements, they would have been foolish to try to take their claims to the Tax Court given the plain language of the authorizing statutes.

It is unreasonable to believe that Congress intended to allow judicial review *only* to taxpayers with a net worth below $2,000,000. However, it is reasonable for Congress to establish limited pre-payment review in the Tax Court for those with a net worth below $2,000,000 and leave review for those with a more substantial net worth to the "pay and sue" remedy pursued here by the Hincks, and by the Bealls and Weiner. It is more unreasonable to believe that Congress intended to deny all judicial review to all taxpayers, even those who meet the net worth requirements, if they do not also meet the "prevailing party" requirements of §7430(c)(4)(A).

The Federal Circuit's interpretation results in an improper taking or conversion of the rights of certain taxpayers – individuals with a net worth over $2,000,000, probably most corporations, and all taxpayers who do not meet the "prevailing party" requirements of §7430(c)(4)(A) – to judicial review when the IRS denies their §6404(e)(1) abatement requests, and violates their substantive and procedural due process rights by denying them any forum in which to raise their claim. As a result, there would be no IRS accountability for denying almost all §6404(e)(1) abatement requests, particularly those made by high net-worth individuals and corporate taxpayers. *I.R.S. v. Blais*, 612 F.Supp. 700, 704 (D.Mass.1985) ("The law abhors power without accountability. Unpoliced power invites abuse and corruption.").

This is wholly inconsistent with the grant of relief under §6404(e)(1) being unrestricted to all taxpayers. The

restrictions only appear in §6404(h), which creates the grant of pre-payment jurisdiction to the Tax Court.

An individual's right to pursue legal redress for claims with a reasonable basis in law and fact is fundamental and protected by numerous provisions of the Constitution including: the Due Process Clauses of the Fifth and Fourteenth Amendments, the Equal Protection Clause, the Sixth Amendment, the Privileges and Immunities Clause of Article IV, and the First Amendment protection of the right to petition. *Chambers v. Baltimore & Ohio RR Co.*, 207 U.S. 142, 148 (1907); *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1371 (Fed. Cir. 2004) (5th Amendment); *Bounds v. Smith*, 430 U.S. 817, 821 (1977) (14th Amendment); *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (Equal Protection Clause); *Johnson v. Avery*, 393 U.S. 483 (1969) (6th Amendment); *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852, 857 (5th Cir. 2000) (Privileges and Immunities); *Calif. Motor Transp. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (1st Amendment). The Due Process Clause of the 14th Amendment guarantees access to both state and federal courts. *DeWitt v.Pail*, 366 F.2d 682, 685 (9th Cir. 1966); *Brinkerhoff-Faris Trust & Savs. Co. v. Hill*, 281 U.S. 673, 679-80 (1930). This right cannot be infringed upon or burdened. *Silver v. Cormier*, 529 F.2d 161, 163 (D.C.Colo. 1976), *citing Adams v. Carlson*, 488 F.2d. 619, 630 (7th Cir. 1973). A court of competent jurisdiction is required for legal redress. *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1027 (5th Cir. 1982).

Denying certain taxpayers *any* forum to raise their §6404(e)(1) abatement claim is improper when "under the law there is no other court to which they could go . . . [and] could amount to a denial of due process under the 14th amendment to the Constitution." *Atkins v. United States*, 556 F.2d 1028, 1040 (Ct.Cl. 1977) *citing Boddie v. Conn.*, 401 U.S. 371, 377 (1971); *Xechem I'natl, Inc. v. Univ. of Texas*, 382 F.3d 1324, 1334-35 (Fed.Cir. 2004) concurring

opinion. (In an action for a taking or conversion "a factor in the due process provision of the 14th Amendment is whether any remedy is otherwise available. . . . [I]f no remedy is indeed available . . . by federal preemption of the cause of action – there can arise an affront to the fundamentals of due process."); *Benedict v. Sec. of Dept. of H.H.S.*, 29 Fed.Cl. 587, 594 (1993) ("[T]he guaranty of due process applies to the judicial branch as well as the legislative, executive, and administrative branches of government.").

The denial of any pre-payment or refund forum violates the well established rule that a pre-payment forum is unnecessary and "the availability to a taxpayer of a post-payment judicial forum in which to obtain a determination of his tax obligations is sufficient to satisfy due process requirements." *Barlow v. Commissioner*, 301 F.3d 714, 722 (6th Cir. 2002), *citing Phillips v. Commissioner*, 283 U.S. 589, 595 (1931).

B. "Claim-Splitting" is Prohibited

The Fifth Circuit recognized that certain plaintiffs would be forced to split their abatement claims from their refund claims if the district courts and the Claims Court cannot hear §6404(e)(1) claims. The Fifth Circuit acknowledged that claims splitting is generally considered undesirable. *Beall* at Pet. App. 37 *citing In re Super Van, Inc.*, 92 F.3d 366, 371 (5th Cir.1996).

The Federal Circuit again rejected the Fifth Circuit's concerns and stated:

> That the interest abatement claim may have to be separated from a refund claim may not appear to be efficient, but that policy concern does not compel a different statutory construction when the statute seems clear.

Pet. App. 17.

But this Court has long recognized that such "claim-splitting" is improper because "the first decision would, of course, control." *Flora* II, 362 U.S. at 165. See also *United States v. Shanbaum*, 10 F.3d 305, 314 (5th Cir. 1994):

> "[A taxpayer's] total income tax liability for each taxable year constitutes a single, unified cause of action, regardless of the variety of contested issues and points that may bear on the final computation." *Finley v. United States*, 612 F.2d 166, 170 (5th Cir.1980). Thus, "if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is *res judicata* as to any subsequent proceeding involving the same claim and the same tax year." *Commissioner v. Sunnen*, 333 U.S. 591, 598, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948).

"To discourage [claim-splitting], judges award plaintiffs not the better outcome but the first outcome: whichever suit goes to judgment first is dispositive, and the doctrine of claim preclusion (*res judicata*) requires the other court to dismiss the litigation." *Rogers v. Desiderio*, 58 F.3d 299, 300 (7th Cir. 1995).

By forcing taxpayers to split their claims, the Federal Circuit's interpretation would again cause an unlawful taking or conversion of the taxpayer's right to legal redress as to the claim not decided first. Here the issue is moot as to the Hincks and the Bealls since they were specifically chosen as the lead cases on the §6404(e) issue because §6404(e) was the only grounds for refund remaining in their cases. However, almost all of the AMCOR partners with refund suits pending are like Weiner, *i.e.* they filed their refund claims on multiple grounds for the same tax years.

C. Exclusive Tax Court Jurisdiction Would Leave Taxpayers at the Mercy of the IRS

The Federal Circuit's structural scheme restricting review of §6404(e)(1) denials to the Tax Court leaves taxpayers at the mercy of the IRS. Similar to a notice of deficiency, an IRS denial of a claim for abatement is a prerequisite to Tax Court jurisdiction over §6404 interest abatement claims. §6404(h)(1). But the statute granting the Tax Court jurisdiction over those claims does not provide a remedy if the IRS fails or refuses to issue a denial. As a result taxpayers who file claims for abatement of interest can be left with no right to judicial review in the Tax Court. *See Bourekis v. C.I.R.*, 110 T.C. 20, 26 (1998) ("[U]nder §6404(g) ... a notice of final determination not to abate interest is a prerequisite to the Court's jurisdiction and serves as a taxpayer's 'ticket' to the Tax Court."). In contrast, if the IRS fails or refuses to act on a claim for refund under §7422(a), then after six months taxpayers have the right to file an action in the Claims Court or district court. §6532(a)(1).

CONCLUSION

The judgment of the Federal Circuit should be reversed.

Respectfully Submitted,

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FEBRUARY 2007

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House Report No. 99-426

99th Congress House of Representatives Rept. 99-426

1st Session

TAX REFORM ACT OF 1985

December 7, 1985.–Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

MR. ROSTENKOWSKI, from the Committee on Ways and Means, submitted the following

REPORT

together with

[To accompany H.R. 3838]

together with

DISSENTING AND ADDITIONAL DISSENTING VIEWS

The Committee on Ways and Means, to whom was referred the bill (H.R. 3838) and reform the internal revenue laws of the United States, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

(1)

pp. 2-843

Redacted

House Report No. 99-426 844

2. Authority to Abate Interest Due to Errors or Delay by the IRS

(§1322 of the bill and §6404 of the Code)

Present Law

Under present law, the IRS does not generally have the authority to abate interest charges where the additional interest has been caused by IRS errors and delays. This results from the IRS's long-established position that once tax liability is established, the amount of interest is merely a mathematical computation based on the rate of interest and due date of the return. Consequently, the interest portion of the amount owed to the Government cannot be reduced unless the underlying deficiency is reduced. The IRS does, however, have the authority to abate interest resulting from a mathematical error of an IRS employee who assists taxpayers in preparing their income tax returns (sec. 6404(d)).

Reasons for Change

In some cases, the IRS has admitted that its own errors or delays have caused taxpayers to incur additional interest charges. This may even occur after the underlying tax liability has been correctly adjusted by the IRS or admitted by the taxpayer. The committee believes that where an IRS official acting in his official capacity fails to perform a ministerial act, such as issuing either a statutory notice of deficiency or notice and demand for payment after all procedural and substantive preliminaries have been completed, authority should be available for the IRS to abate the interest independent of the underlying tax liability. The committee is especially concerned about IRS errors that cause taxpayers to receive much larger refunds than they are entitled to.

Explanation of Provision

In cases where an IRS official fails either to perform a ministerial act in a timely manner or makes an error in performing a ministerial act, the IRS has the authority to abate the interest attributable to such delay. No aspect of

the delay can be attributable to the taxpayer. The bill gives the IRS the authority to abate interest but does not mandate that it do so (except that the IRS must do so in cases of erroneous refunds of less than $1 million, described below). The committee does not intend that this provision be used routinely to avoid payment of interest; rather, it intends that the provision be utilized in instances where failure to abate interest would be widely perceived as grossly unfair. The interest abatement only applies to the period of time attributable to the failure to perform the ministerial act.

The provision applies only to failures to perform ministerial acts that occur after the taxpayer has been contacted by the IRS. This provision does not therefore permit the abatement of interest for the period of time between the date the taxpayer files a return and the date the IRS commences an audit, regardless of the length of that time period. Similarly, if a taxpayer files a return but does not pay the taxes due, this provision would not permit abatement of

this interest regardless of how long the IRS took to contact the taxpayer and request payment.

The committee intends that the term "ministerial act" be limited to nondiscretionary acts where all of the preliminary prerequisites, such as conferencing and review by supervisors, have taken place. Thus, a ministerial act is a procedural action, not a decision in a substantive area of tax law. For example, an unreasonable delay in the issuance of a statutory notice of deficiency after the IRS and the taxpayer have completed efforts to resolve the matter would be grounds for abatement of interest.

Under its general authority to issue regulations, the IRS can issue regulations determining what constitutes a

reasonable time for performing various ministerial acts called for by the Code.

The committee intends that the IRS exercise this authority to abate interest in instances in which it issues an erroneous refund check. For example, it has come to the committee's attention that the IRS may make an error that causes a taxpayer to get a refund check for $1,000 instead of the $100 that the taxpayer rightfully claimed. In the past, the IRS charged the taxpayer interest on the $900 for the time period that the taxpayer held that money.

The committee believes that it is inappropriate to charge taxpayers interest on money they temporarily have because the IRS has made an error. Consequently, the committee instructs the IRS not to charge interest on these erroneous refunds. The committee intends that two limitations be placed on this rule. First, it is not to apply in instances in which the taxpayer has caused the overstated refund to occur, such as by overstating a claim for refund on a tax return. Second, it is not to apply to any erroneous refund checks that exceed $1 million.

Effective Date

This provision is effective for interest accruing with respect to deficiencies or payments for taxable years beginning in 1982. With respect to taxable years 1982, 1983, and 1984, the committee intends that taxpayers initiate a request that the IRS abate the interest and issue a refund. For taxable years following these years, the committee intends that the IRS offer on its own, in appropriate circumstances, to abate interest. Taxpayers may also request that the IRS abate interest.

Brief App. 6

Calendar No. 665

99th Congress
2nd Session

Senate

Report
99-313

TAX REFORM ACT OF 1986

May 29 (legislative day, May 19), 1985–Ordered to be printed

MR. PACKWOOD, from the Committee on Finance submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To Accompany H.R. 3838]

[Including cost estimate of the Congressional Budget Office]

pp.1-207 –

Redacted

Senate Report No. 99-313 208

3. Authority to Abate Interest Due to Errors or Delay by the IRS

(§552 of the bill and §6404 of the Code)

Present Law

Under present law, the IRS does not generally have the authority to abate interest charges where the additional interest has been caused by IRS errors and delays. This results from the IRS' long-established position that once a tax liability is established, the amount of interest is merely a mathematical computation based on the rate of interest

and due date of the return. Consequently, the interest portion of the amount owed to the Government cannot be reduced unless the underlying deficiency is reduced. The IRS does, however, have the authority to abate interest resulting from a mathematical error of an IRS employee who assists taxpayers in preparing their income tax returns (sec. 6404(d)).

Reasons for Change

In some cases, the IRS has admitted that its own errors or delays have caused taxpayers to incur additional interest charges. This may even occur after the underlying tax liability has been correctly adjusted by the IRS or admitted by the taxpayer. The committee believes that where an IRS official acting in his official capacity fails to perform a ministerial act, such as issuing either a statutory notice of deficiency or notice and demand for payment after all procedural and substantive preliminaries have been completed, authority should be available for the IRS to abate the interest independent of the underlying tax liability.

Explanation of Provision

In cases where an IRS official fails either to perform a ministerial act in a timely manner or makes an error in performing a ministerial act, the IRS has the authority to abate the interest attributable to such delay. No significant aspect of the delay can be attributable to the taxpayer. The bill gives the IRS the authority to abate interest but does not mandate that it do so (except that the IRS must do so in cases of certain erroneous refunds of less than $1 million, described below). The committee does not intend that this provision be used routinely to avoid payment of interest; rather, it intends that the provision be utilized in instances where failure to abate interest would be widely perceived as grossly unfair. The interest abatement only applies to the period of time attributable to the failure to perform the

ministerial act.

The provision applies only to failures to perform ministerial acts that occur after the IRS has contacted the taxpayer in writing. This provision does not therefore permit the abatement of interest for the period of time between the date the taxpayer files a return and the date the IRS commences an audit, regardless of the length of that time period. Similarly, if a taxpayer files a return but does not pay the taxes due, this provision would not permit abatement of this interest regardless of how long the IRS took to contact the taxpayer and request payment.

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The committee intends that the term "ministerial act" be limited to nondiscretionary acts where all of the preliminary prerequisites, such as conferencing and review by supervisors, have taken place. Thus, a ministerial act is a procedural action, not a decision in a substantive area of tax law. For example, a delay in the issuance of a statutory notice of deficiency after the IRS and the taxpayer have completed efforts to resolve the matter could be grounds for abatement of interest. The IRS may define a ministerial act in regulations.

Under its general authority to issue regulations, the IRS can issue regulations determining what constitutes timely performance of various ministerial acts called for by the Code.

The IRS must abate interest in certain instances in which it issues an erroneous refund check. For example, it has come to the committee's attention that the IRS may make an error that causes a taxpayer to get a refund check for $1,000 instead of the $100 that the taxpayer rightfully claimed. In the past, the IRS charged the taxpayer interest on the $900 for the time period that the taxpayer held that money.

The committee believes that it is inappropriate to charge taxpayers interest on money they temporarily have because the IRS has made an error. Consequently, the IRS may not charge interest on these erroneous refunds until the date it demands repayment of the money. The committee intends that two limitations be placed on this rule. First, it is not to apply in instances in which the taxpayer (or a related party) has in any way caused the overstated refund to occur. Second, it is not to apply to any erroneous refund checks that exceed $1 million. If the taxpayer does not repay the erroneous refund when requested to do so by the IRS, interest would then begin to apply to the amount of the erroneous refund.

Effective Date

This provision is effective for interest accruing with respect to deficiencies or payments for taxable years beginning in or after 1982. With respect to taxable years 1982, 1983, and 1984, the committee intends that taxpayers initiate a request that the IRS abate the interest and issue a refund. For taxable years following these years, the committee intends that the IRS abate interest in appropriate circumstances. Taxpayers may also request that the IRS abate interest.

. . . .

[DEFICIENCY IN TAX.]

Sec. 271.(a). If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered (100) *mail, but such deficiency shall be assessed only as hereinafter provided.* Within <30> 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.

Committee Reports

Report - Ways and Means Committee (68th Cong., 1st Sess., H. Rept. 179). - The committee recommends the establishment of a Board of Tax Appeals to which a taxpayer may appeal prior to the payment of an additional assessment of income, excess-profits, war-profits, or estate taxes. Although a taxpayer may, after payment of his tax, bring suit for the recovery thereof and thus secure a judicial determination of the questions involved, he can not, in view of section 3224 of the Revised Statutes, which prohibits suits to enjoin the collection of taxes, secure such a determination prior to the payment of the tax. The right of appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous and which may have, since its receipt, been either wiped out by subsequent losses, invested in nonliquid assets, or spent, sometimes forced taxpayers into bankruptcy, and often causes great financial hardship and sacrifice. These results are not remedied by permitting the taxpayer to sue for the recovery of the tax after this payment. He is entitled to an appeal to a determination of his liability for the tax prior to its payment.

Under the existing law a taxpayer prior to the

payment of his tax may appeal to the Commissioner, who has established the Committee on Appeals and Review, to determine these appeals for him. The objections that have been raised to this procedure are four: (1) The appeal is from the action of the Bureau of Internal Revenue but is taken to a committee in and a part of the bureau. It is urged that such an appeal does not involve a review by an impartial outside body, such as the taxpayer is entitled to prior to payment of the tax. (2) In the hearing on the appeal the person who is to decide the appeal acts both as advocate and judge, since he must both protect the interests of the Government and decide the questions involved. Such conditions do not insure an impartial determination of the case. (3) If the decision on the appeal is in favor of the Government, the taxpayer has the right to test the correctness of the decision in the courts, but if the decision is in favor of the taxpayer, the action of the bureau is final and the correctness of the decision can never be tested in the courts. It is contended that this condition results in the decision of most doubtful points in favor of the Government. (4) The taxpayer is usually forced to come to Washington for the hearing on his appeal, an expensive and burdensome procedure.

* * *

Under the provisions of the proposed bill creating a Board of Tax Appeals the taxpayer may, prior to the payment of the additional assessment of income, war-profits, excess-profits, or estate taxes, appeal to the Board of Tax Appeals and secure an impartial and disinterested determination of the issues involved. In the consideration of the appeal both the Government and the taxpayer will appear before the board to present their cases, with the result that each member of the board will sit solely as judge and not as both judge and advocate. The provision allowing the Commissioner to sue in court for the recovery of any taxes thought by him to be due in excess of that decided by

the board to be due relieves the board from the responsibility of finally passing upon questions involving large amounts and removes the necessity for a decision in favor of the Government in order to force the issues into court. The divisions of the board will sit locally throughout the united States to enable taxpayers to argue their cases with as little inconvenience and expense as is practicable. This proposal meets all the objections that have been raised s to the existing system and at the same time provides for a flexible and informal procedure which will permit the board to determine expeditiously the cases brought before it on appeal. (p.7-8)

This subdivision provides for notice, and an opportunity for an appeal to the Board of Tax Appeals (a body provided for in section 900 of the proposed act), in cases in which the Commissioner determined that there is a deficiency. (p.24)

Report - Conference Committee (68th Cong., 1st Sess., H. Rept. 844). - Same, except for clerical changes, as Ways and Means Committee Report. (p. 8-9, 30-31, respectively)

Report - Conference committee (68th Cong., 1st Sess., H. Rept. 844). - Amendment No. 100: This amendment makes a clerical change; and the House recedes. (p.23)

Congressional Discussion

Discussion - House (Cong. Rec. Vol. 65). - MR. GREEN of Iowa. * * * In the revision of the law a special effort was made to give the taxpayer a better opportunity to present his case when he thought the tax was being unjustly levied against him or being levied in too great an amount. For this purpose a board of tax appeals is created, to be appointed by the President and to hear the cases. (p.2429)

MR. CHINDBLOM. * * * It will be noted that there is now a committee on appeals and review, but this committee or divisions thereof merely act for and on behalf of the commissioner and report their findings to the commissioner, who thereupon takes final action, but of course in most cases his approval is a matter of form and routine. In fact, where he stops to give any consideration, he generally refers the case to his solicitor, who in his turn again acts for and on behalf of the commissioner. Through all of these proceedings the Treasury Department is the party in interest, the plaintiff or prosecutor, the court or jury, and the final beneficiary and the final judgment or decree creditor, and, it might be added, the sheriff or marshal serving execution and making collection. More than that, the person deciding the appeal is both advocate and judge, since he represents throughout the proceedings the department of the Government which is seeking the collection of the tax, while he also has the power to determine the rights and obligations of the taxpayer. In addition, under the present law an erroneous or prejudicial decision in favor of the Government still allows the taxpayer the opportunity, notwithstanding all those difficulties, of securing a review in the courts after payment of the tax, while a decision against the Government or in favor of the taxpayer leaves the department and the Government without any further recourse.

The further objection has been made that under the present law every taxpayer seeking relief even under present conditions must come to the National Capital to present his case. The bill seeks to remedy this complaint. (p.2684)

Amendment offered by MR. ALLEN: * * * insert "within 60 days after such notice has been received the taxpayer may file an appeal with the board of tax appeals established by section 900."

* * * *

MR. CHINDBLOM. I will say to the gentleman that as a matter of time we are not concerned about the difference between 30 days and 60 days, but as to the proposition that the law should provide a sufficient time after the notice has been received there is much danger in compelling the department to prove the actual receipt by the addressee.

* * * *

MR. CHINDBLOM. Of course, it has been held that proof of mailing is, prima facie, receipt of notice by the addressee. The department can know when it mails a letter, while it can not know when the addressee received it. The addressee may be away from home or he may have moved, and other things may have occurred which would make it unfair to compel the department to prove that the addressee received the letter.

MR. ALLEN. That could be remedied if you would strike out the word "received."

MR. CHINDBLOM. That can be done by changing the word to "thirty" to the word "sixty." (p.2969-70)

Discussion Senate (Cong. Rec. Vol. 65). On appeal to Board, in general. (p.8109-15)

Committee Hearings

Hearings - Senate finance Committee - Explanation of provision in relation to existing law. (A. W. Gregg - Treas. Dept. - p.24)

Providing for preliminary local hearing first. (G. C. Henckel, p.331)

Chief Counsel Notice (6/5/2000).
Change in Litigating Position

DOCUMENT NUMBER:	N(35)000-338 UIL 6015.00-00
SUBJECT:	Change in Litigating Position
CANCELLATION DATE:	Upon Incorporation into the CCDM

PURPOSE

The purpose of this Notice is to announce a change in the Service's litigating position with respect to whether the Service's determination that a spouse is not entitled to relief from joint and several liability under I.R.C. section 6015(f) is reviewable by any court. The Service now agrees that the Tax Court, the United States district courts (including the bankruptcy courts) and the Court of Federal Claims have jurisdiction to consider whether the Service abused its discretion in denying equitable relief under I.R.C. section 6015(f).

Section 3201 of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA98), Pub. L. No. 105-206, repealed I.R.C. section 6013(e) effective for all liabilities arising after July 22, 1998, and liabilities arising before July 22, 1998, that were unpaid as of that date, replacing that provision with new section 6015. Under the new statutory scheme, relief from joint and several liability can be obtained in one of three ways: under the more liberalized innocent spouse provisions of section 6015(b); under section 6015(c), limiting liability to the portion of the deficiency attributable to items allocable to the taxpayer; and, where a spouse fails to qualify under either of those subsections, by a grant of equitable relief from the Secretary under section 6015(f).

The Service unsuccessfully argued in the Tax Court that the Service's denial of a claim for equitable relief under section 6015(f)

was not subject to judicial review by any court in Butler v. Commissioner, 114 T.C. No. 19 (filed April 28, 2000); Fernandez v. Commissioner, 114 T.C. No. 21 (filed May 10, 2000); and Charlton v. Commissioner, 114 T.C. No. 22 (filed May 16, 2000). The Service will no longer contest the jurisdiction of the Tax Court, the United States district courts (including the bankruptcy courts) or the Court of Federal Claims to review, under an abuse of discretion standard, the Service's denial of equitable relief under section 6015(f). This change in litigating position was made public through the release of an action on decision (AOD) on May 12, 2000, acquiescing in the Tax Court's opinion in Fernandez. Fernandez v. Commissioner, AOD CC-2000-06 (May 12, 2000). This Notice is intended to clarify that the change in the Service's litigating position extends to all claims for relief under section 6015(f), regardless of whether an election has been made under section 6015(b) or (c).

The Tax Court does not consider a withdrawn motion as one that extends the time to answer under T.C. Rule 25(c). Accordingly, in light of the change in the Service's litigating position described above, in cases presently pending before the Tax Court in which respondent has filed a motion to dismiss (in whole or in part) for lack of jurisdiction with respect to the spouse's section 6015(f) claim prior to answer or in lieu of answer, district counsel attorneys should promptly file a Notice of No Objection to the Denial of Respondent's Motion to Dismiss For Lack of Jurisdiction stating that respondent no longer contests the Tax Court's jurisdiction with respect to the spouse's section 6015(f) claim and requesting the court to deny our motion. A sample Notice of No Objection is attached as Exhibit A. If the case has already been answered, then a Motion to Withdraw Respondent's Motion to Dismiss For Lack of Jurisdiction may be filed.

With respect to cases presently pending before the United States district courts (including the bankruptcy courts) or the Court of Federal Claims in which a motion to dismiss (in whole or in part) for lack of jurisdiction with respect to the spouse's section 6015(f) claim has been filed by the government, district counsel attorneys should send a letter to the Department of Justice requesting that the

Department of Justice take all steps necessary to implement the Service's change in litigating position described in this Notice, such as withdrawing its motion to dismiss for lack of jurisdiction.

District counsel attorneys are now authorized to make determinations regarding a spouse's entitlement to relief under section 6015(f) in cases within Counsel's jurisdiction.

Please contact the Procedural Branch of the Field Service Division at (202)622-7950 if you have any questions regarding this Notice.

/s/____

MARLENE GROSS

Deputy Chief Counsel (Operations)

EXHIBIT A

UNITED STATES TAX COURT

JOHN AND MARY DOE,	§	
Petitioners,	§	
v.	§	Docket: 0000-00
COMMISSIONER OF	§	
INTERNAL REVENUE,	§	
Respondent.	§	

NOTICE OF NO OBJECTION
TO DENIAL OF RESPONDENT'S MOTION TO DISMISS
FOR LACK OF JURISDICTION [AND TO STRIKE]

RESPONDENT NOTIFIES the Court that respondent has no objection to the denial of respondent's Motion to Dismiss for Lack of Jurisdiction [and to Strike], filed in the above-entitled case on ____.

IN SUPPORT THEREOF, respondent respectfully states:

1. On ____, respondent filed a Motion to Dismiss for Lack of Jurisdiction [and to Strike] on the ground that the Tax Court lacks jurisdiction to review respondent's determination that a spouse is not entitled to equitable relief under the provisions of I.R.C. §6015(f).

2. Subsequent to the filing of respondent's motion, this Court in *Butler v. Commissioner*, 114 T.C. No. 19 (April 28, 2000), held that, in a case involving a petition for a redetermination of a deficiency, the Court has jurisdiction to review for abuse of discretion respondent's determination to deny a petitioner's request for equitable relief pursuant to section 6015(f). See also *Charlton v. Commissioner*, 114 T.C. No. 22 (May 16, 2000). Similarly, in *Fernandez v. Commissioner*, 114 T.C. No. 21 (May 10, 2000), the Court held that it had jurisdiction to review a determination denying section 6015(f) equitable relief in a case involving a petition for relief from joint and several liability brought under the provisions of I.R.C. §6015(e).

3. Respondent recently announced that the Internal Revenue Service acquiesces in the holding of the Court in *Fernandez, supra*, and stated that respondent will no longer contest the Tax Court's jurisdiction to review a request for innocent spouse relief under section 6015(f), when the requirements of section 6015(e) have been met. *Fernandez v. Commissioner*, AOD CC-2000-06 (May 12, 2000).

4. Accordingly, it is respondent's position that the Court has properly acquired jurisdiction in the instant case to review respondent's determination of petitioner's entitlement to section 6015(f) relief. It follows that respondent's motion to dismiss for lack of

jurisdiction [and to strike] should be denied.

5. Respondent's counsel has notified petitioners [petitioners, counsel] that respondent has modified his position with respect to the jurisdictional issue presented by respondent's motion to dismiss. Petitioners [Petitioners, counsel] has authorized respondent to represent that petitioners agree that respondent's motion should be denied on the basis set forth above.

WHEREFORE, it is prayed that respondent's Motion to Dismiss for Lack of Jurisdiction [and to Strike], filed ____ be denied.

STUART L. BROWN

Chief Counsel

Internal Revenue Service

By: ____
Attorney
Internal Revenue Service
T.C. Bar No.
Address Line 1
Address Line 2
Telephone No.

____
Assistant District Counsel
Internal Revenue Service
T.C. Bar No.
Address Line 1

Address Line 2
Telephone No.

OF COUNSEL:
Regional Counsel
District Counsel

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing paper was served on ___ by mailing the same in a postage paid wrapper addressed as follows:

Petitioner [petitioners' counsel]
Address Line 1
Address Line 2
Dated: ___
By: ___
Attorney
Internal Revenue Service
T.C. Bar No.